In the
Supreme Court of the United States.

OCTOBER TERM, 1977.

No. 77-1388

COMMONWEALTH OF MASSACHUSETTS,
PETITIONER,

v.

CHARLES F. WHITE,
RESPONDENT.

Petition for a Writ of Certiorari to the Supreme Judicial Court of the Commonwealth of Massachusetts.

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BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS.

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Opinion Below.

The opinion of the court below (App. A, *infra*, pp. 1a-10a) is reported at Mass. Adv. Sh. (1977) 2805.

Jurisdiction.

The decision of the court below was entered on December 30, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

Question Presented.

Whether statements held inadmissible at trial because there was no intelligent waiver of *Miranda* v. *Arizona* safeguards may be used to establish probable cause for the issuance of a search warrant?

Constitutional Provision Involved.

FIFTH AMENDMENT.

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Statement of the Case.

PRIOR PROCEEDINGS.

On May 20, 1978, Charles White, after a jury-waived trial, was found guilty on four indictments charging him with unlawful possession with intent to distribute controlled substances, namely, marihuana, amphetamines, cocaine and L.S.D., in violation of Mass. Gen. Laws, c. 94C, § 31. Prior to trial, the defendant filed a motion to suppress all oral and written statements taken from him at the time of and following his arrest, and all evidence seized from his automobile following his arrest. After a pre-trial hearing, the trial judge issued *Findings and Rulings* on the motion to suppress in which he concluded that the statements must be suppressed, but that the drugs and currency seized pursuant to a search warrant in the defendant's car were admissible (App. B, *infra*, pp. 11a-19a).

On appeal, the Supreme Judicial Court reversed and set aside the trial court's *Findings and Rulings* on the admissibility of the evidence resulting from the search of the automobile. *Commonwealth* v. *White*, Mass. Adv. Sh. (1977) 2805.

STATEMENT OF FACTS.

The facts as found by the trial judge, and as adopted by the Supreme Judicial Court, are as follows:

On March 28, 1975, at about 2 a.m., the chief of police of Ashfield, Massachusetts was notified that an automobile accident had occurred. He proceeded to the scene and found a car which had gone off the road and over an embankment, hitting several posts. The defendant was behind the wheel of the car, trying to drive it back over the embankment and onto the

highway. As the chief approached the car, the defendant asked him to help, stating that he thought that with a "push" he could "make it over the embankment." (App. A, p. 2a; App. B, p. 11a.)

Chief Zalenski, however, noticed that the defendant appeared to be under the influence of either drugs or alcohol, or both. His eyes appeared glassy, his speech was somewhat slurred, and there was a strong odor of alcohol on his breath. The chief accordingly ordered him from the motor vehicle, read him the *Miranda* warnings, and placed him under arrest. He told the defendant to follow him to his cruiser, and although the defendant staggered a bit as he did so, he was able to walk up the embankment without assistance. Chief Zalenski then called the Massachusetts State Police for assistance. (App. A, p. 2a; App. B, pp. 11a-12a.)

Trooper Taliaferro of the Massachusetts State Police responded to Chief Zalenski's call. When he arrived at the scene, the chief told him that the defendant was under arrest and asked him to give the defendant a breathalyzer test at the State Police barracks. Both officers then proceeded to the barracks in their respective cruisers. Chief Zalenski took the defendant with him in his cruiser. (App. A, p. 2a; App. B, p. 12a.)

When the two officers and the defendant arrived at the State Police barracks, Trooper Taliaferro read the *Miranda* warnings to the defendant and advised him of his right to use a telephone. He also informed him, in accordance with G.L. c. 90, § 24(l)(f), that his license to operate a motor vehicle would be suspended for 90 days if he refused to submit to a breathalyzer test. The defendant responded that he "might as well" take the test since "I'll lose my license either way." He also attempted, however, to use a telephone in an effort to retain the services of a lawyer. (App. A, pp. 2a-3a; App. B, p. 12a.)

The defendant had some difficulty using the telephone. He dropped coins on the floor several times while attempting to do so. He did succeed in completing two calls, one to an attorney whom he asked to represent him, but was unable to obtain the services he sought. After a period of about 40 to 50 minutes, the breathalyzer test was administered by Trooper Taliaferro. The test indicated that the percentage, by weight, of alcohol in the defendant's blood was, at that time, thirteen one hundredths.[1] (App. A, p. 3a; App. B, p. 12a.)

After the breathalyzer test was completed, Trooper Taliaferro prepared to place the defendant in a cell. Before doing so he searched the defendant's person and found what appeared to be a marihuana cigarette in his shirt pocket. At that time the trooper told him that he would also be charged with possession of marihuana, and he again read the *Miranda* warnings to him. The defendant responded that he saw nothing wrong in the possession of one marihuana cigarette. The officer then asked him if he had any other marihuana on his person or in his car, and the defendant responded that he had more marihuana in his car. The defendant then stated that he could name some "biggies,"[2] but Trooper Taliaferro told him that he did not want him to say anything further. (App. A, p. 3a; App. B, p. 13a.)

After the defendant was secured in a cell, Trooper Taliaferro prepared an application for a search warrant and an affidavit in support of that application. The affidavit read, in material part, as follows:

> "On March 28, 1975 I assisted Chief Walter Zalenski [*sic*] Ashfield PD with a subject under arrest for operating

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[1] The results of the test created a statutory presumption that the defendant was under the influence of intoxicating liquor. G.L. c. 90, § 24(l)(e).

[2] The defendant was apparently referring to certain drug dealers whom he was willing to identify in exchange for leniency.

under the influence. I gave the defendant, Charles F. White his miranda [*sic*] rights. I than [*sic*] searched the prisoner and found (1) one marijuana cigarette in the breast pocket of his tee shirt colorgreen [*sic*]. I questioned the prisoner regarding the marijuana cigarette. He, Charles F. White stated that he had some marijuana in his vehicle which he had been driving at the time of his arrest." (App. A, p. 4a; App. B, p. 13a.)

A warrant for a search of the defendant's motor vehicle was issued on the basis of the application and the supporting affidavit. Upon a search of the vehicle a substantial quantity of various controlled substances plus $3,195 in cash[3] was discovered in the vehicle's trunk. (App. A, p. 4a; App. B, pp. 13a-14a.)

Reasons for Granting the Writ.

The petitioner argues the following reasons why this petition for writ of certiorari should be granted:

1. The petition presents a novel question of law not previously addressed by this Court.

2. The decision of the court below represents an unwarranted expansion of the exclusionary rule enunciated in *Miranda* v. *Arizona*, 384 U.S. 436 (1966), which is in conflict with the spirit of *Michigan* v. *Tucker*, 417 U.S. 433 (1974).

[3]The cash was in a strong box which was found in the trunk.

STATEMENTS WHICH ARE HELD TO BE INADMISSIBLE AT TRIAL, AS A RESULT OF A VIOLATION OF MIRANDA V. ARIZONA, 384 U.S. 436 (1966), MAY BE USED TO ESTABLISH PROBABLE CAUSE SUFFICIENT TO OBTAIN A VALID SEARCH WARRANT.

The Supreme Judicial Court upheld the trial court's finding that the defendant's statement must be suppressed as the Commonwealth had not met its burden of demonstrating that the defendant knowingly or intelligently waived his right to counsel or his privilege against self-incrimination. The court further held that the statements could not be used in support of the application for the search warrant. It is from this ruling that the Commonwealth seeks certiorari.

A. *Miranda v. Arizona, 384 U.S. 436 (1966), does Not Establish a Per Se Rule that Evidence, Seized in Violation of the Principles Set Forth Therein, Must be Excluded from All Proceedings.*

The Supreme Judicial Court, the Commonwealth submits, has adopted a per se approach to *Miranda* which stretches the application of the exclusionary rule far beyond the outer limits of that decision. Such an approach is at odds with rulings of this Court.

In *Harris* v. *New York*, 401 U.S. 222 (1971), this Court held that a statement of an accused taken in violation of *Miranda* could be used to impeach the direct testimony of the accused at trial. The Court stated:

> "It does not follow from *Miranda* that evidence inadmissible against an accused in the prosecution's case in chief is barred for all purposes, provided of course that the trustworthiness of the evidence satisfies legal standards." 401 U.S. at 224.

Again, in *Michigan* v. *Tucker*, 417 U.S. 433 (1974), this Court held admissible at trial the testimony of a witness whom the police discovered as a result of the defendant's statement which had been taken in violation of *Miranda*. See also *United States* v. *Janis*, 428 U.S. 433 (1976).

The Commonwealth submits that *Michigan* v. *Tucker* controls the instant case. The only significant difference involves the type of evidence to be offered at trial. In the instant case, real evidence was seized. Factors which strengthen the argument for admission here are that the real evidence carries with it greater indicia of trustworthiness than the oral testimony held admissible under *Tucker*, *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 250 (1973) (Powell, J., concurring), and that it was seized pursuant to an otherwise valid warrant.

Evidence, although inadmissible at trial, has traditionally been an appropriate basis for determining probable cause for a search warrant. *Spinelli* v. *United States*, 393 U.S. 410 (1969) (hearsay). The fact that the statements were later held to be inadmissible at trial (the only sanction specifically required by *Miranda*) should not render them impermissible for a determination that probable cause exists for the issuance of a search warrant. It would be particularly inappropriate to do so where, as here, the search warrant was applied for in good faith.

Moreover, the central purpose of the exclusionary rule is to deter police misconduct.

> "The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right. . . . Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force." *Michigan* v. *Tucker*, *supra*, at 447.

In the instant case there is no element of deliberate police misconduct involved. In fact, the trial judge found: "In this case the arresting officers were scrupulous in their efforts to obey the mandate of *Miranda*" (App. B, p. 18a). The defendant was read his rights on at least three occasions. The only interrogation of the defendant consisted of a single question put to him in response to an unsolicited statement by him that he did not think possession of a single marihuana cigarette was a crime. There is nothing in the record to indicate any dishonesty of purpose or effort to coerce the defendant on the part of the police.

It is difficult, the Commonwealth submits, to determine what deterrent effect the exclusion of the evidence seized from the defendant's automobile would have on future police conduct. Admission of the evidence would not, the Commonwealth submits, imply judicial sanction of the initial constitutional violation, as the Supreme Judicial Court suggests. *Commonwealth* v. *White*, at 2812 (App. A, p. 7a). The defendant's statements, in strict accordance with *Miranda*, were suppressed prior to trial.

Applying the balancing test of *Janis*, *supra*, and *Tucker*, *supra*, compels a result contrary to that reached by the Supreme Judicial Court. The Commonwealth suggests that, in the instant case, the interest of the public in having a defendant's guilt or innocence determined on the basis of trustworthy evidence outweighs the need to deter improper police misconduct. In this case, there is no indication of any coercive conduct or involuntary statements by the defendant. The court found only that the Commonwealth had not proven that the defendant had intelligently waived his rights (App. B, pp. 14a, 19a). Indeed, the Supreme Judicial Court stated ". . . the more prudent and constitutionally preferable course would have been for the police to withhold any further questioning 'until [the defendant] was clearly capable of responding intelligently.'" *White*, *supra*, at 2811 (App. A, p. 6a).

Where the alleged violation of *Miranda* is of such a non-egregious nature, to require a blanket application of the exclusionary rule is, the Commonwealth suggests, overkill and is not compelled by federal standards.[4]

> "I tend generally to share the view that the *per se* application of an exclusionary rule has little to commend it except ease of application. All too often applying the rule in this fashion results in freeing the guilty without any offsetting enhancement of the rights of all citizens. Moreover, rigid adherence to the exclusionary rule in many circumstances imposes greater cost on the legitimate demands of law enforcement than can be justified by the rule's deterrent purposes. . . . I therefore have indicated, at least with respect to Fourth Amendment violations, that a distinction should be made between flagrant violations by the police, on the one hand, and technical, trivial, or inadvertent violations, on the other. . . ." *Brewer* v. *Williams*, 430 U.S. 387, 413-414 n. 2 (1977) (concurring opinion of Mr. Justice Powell).

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[4]The court in *White* at 2812 (App. A, p. 7a) refers to its prior decision in *Commonwealth* v. *Haas*, ____ Mass. ____ (1977), Mass. Adv. Sh. (1977) 2212, as necessarily requiring extension of the exclusionary rule to the instant case. The Commonwealth submits that, as in the instant case, the same per se application of the exclusionary rule was applied by the court in *Haas*, leading to the conclusion:

> "Where probable cause is established pursuant to a violation of *Miranda*, the arrest is invalid." *Haas* at 2225.

The court based its decision on its interpretation of federal constitutional requirements and not on state law. The Commonwealth submits that *Miranda* did not require such a ruling. See *Haas* at 2236 (concurring opinion, Braucher, J.).

The Commonwealth recognizes that the Fifth Amendment is implicated in the instant case, but suggests that a contrary approach is not mandated. This case simply does not involve any conduct on the part of the police which has been or could be deemed to constitute an intentional attempt to deny the defendant his constitutional rights. Compare *Brewer* v. *Williams*, *supra*.

Therefore, the Commonwealth submits that the deterrent purpose of the exclusionary rule would have little effect in this case, for there was no intention to violate any rights of the defendant.

B. *The "Fruits of the Poisonous Tree" Doctrine was Improperly Applied to the Instant Case.*

The Commonwealth recognizes that this Court has stated that in a proper case the rationale of *Wong Sun* v. *United States*, 371 U.S. 471 (1963), could be applied to Fifth Amendment violations as well as Fourth Amendment violations. *Michigan* v. *Tucker*, *supra*, at 447.

However, the Commonwealth submits that the *proper* case for such application is one in which statements are extracted from a defendant as a result of coercive or intentional bad-faith actions on the part of the police. *United States ex rel. Hudson* v. *Cannon*, 529 F. 2d 890 (7th Cir. 1976). *United States* v. *Payner*, 434 F. Supp. 113 (N.D. Ohio 1977). Moreover, such a requirement is consistent with the purpose of the exclusionary rule for, as the court has stated,

> "'The rule is calculated to prevent, not to repair. Its purpose is to deter — to compel respect for the constitutional guaranty in the only effectively available way — by removing the incentive to disregard it.' *Elkins* v.

United States, 364 U.S. 206, 217 (1960)." *United States* v. *Calandra*, 414 U.S. 338, 347 (1974).

It follows that, in order to effectuate this purpose, some intentional bad-faith conduct must be involved for sanctions in this case to have future effect.

Moreover, it is only in such cases, involving intentional bad faith or coercive conduct, that it may reasonably be said there is a significant danger that the evidence obtained in violation of *Miranda* will be unreliable. "When involuntary statements or the right against compulsory self-incrimination are involved, a second justification for the exclusionary rule has also been asserted: protection of the courts from reliance on untrustworthy evidence." *Michigan* v. *Tucker*, at 448.

The Commonwealth submits that the application of the *Wong Sun* doctrine by the Supreme Judicial Court violates the rationale of *Michigan* v. *Tucker* and has the effect of requiring that police officers conducting good-faith investigations make no mistakes at all.

Therefore, where application of the exclusionary rule would have little practical deterrent effect, where there was no coercive activity by the police which would render the statements involuntary and thereby untrustworthy, the logic of *Michigan* v. *Tucker* would allow use of the statements for the purpose of establishing probable cause for issuance of a search warrant. The Supreme Judicial Court has erred in applying *Miranda* v. *Arizona* as requiring per se exclusion of statements obtained in violation of that decision from consideration as to probable cause for the issuance of a search warrant.

Conclusion.

For the reasons stated above, the petition for writ of certiorari should be granted.

Respectfully submitted,

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Appendix A.

COMMONWEALTH *vs.* CHARLES F. WHITE.

Franklin. May 5, 1977. — December 30, 1977.

Present: HENNESSEY, C.J., QUIRICO, BRAUCHER, KAPLAN, & LIACOS, JJ.

Search and Seizure. Probable Cause. Constitutional Law, Search and seizure, Probable cause, Waiver of constitutional rights. *Practice, Criminal*, Suppression of evidence. *Waiver.*

INDICTMENTS found and returned in the Superior Court on September 9, 1975.

A pre-trial motion to suppress evidence was heard by *Moriarty*, J., and the cases were heard by *Cross*, J.

After review was sought in the Appeals Court, the Supreme Judicial Court, on its own initiative, ordered direct appellate review.

Robert S. Cohen for the defendant.

John M. Finn, Assistant District Attorney (*Stephen R. Kaplan*, Assistant District Attorney, with him) for the Commonwealth.

LIACOS, J. In a jury waived trial held pursuant to the provisions of G. L. c. 278, §§ 33A-33G, the defendant was found guilty on four indictments charging him with unlawful possession with intent to distribute controlled substances, namely, marihuana (Class D); cocaine (Class B); amphetamines (Class B); and LSD (Class C). G. L. c. 94C, § 31. He was sentenced to not more than seven nor less than five years at the Massachusetts Correctional Institution at Walpole as to three of the convictions, the sentences to run concurrently. The marihuana conviction was filed. The defendant appealed to the Appeals Court and we transferred the case here on our motion. We reverse the convictions.

The only point we need consider on this appeal is whether the trial judge was correct in denying the defendant's motion

to suppress evidence of controlled substances, related paraphernalia, and the contents of a strongbox ($3,195) found in a search of the trunk of the defendant's car. The search was pursuant to a search warrant, the affidavit in support of which was based on statements which the judge held should be suppressed as they were obtained in violation of the commands of *Miranda* v. *Arizona*, 384 U.S. 436 (1966). The underlying facts found after a hearing on the defendant's motion are set forth in the judge's findings and rulings on the matter. We state the facts, as embodied therein, necessary for our decision.

At approximately 2 A.M., on March 28, 1975, the chief of police of the town of Ashfield responded to a report of a motor vehicle accident. The defendant's automobile had apparently gone off the road over an embankment, hitting several posts. The chief of police found the defendant in his vehicle alone trying to get his car back on the road. The defendant's behavior and appearance gave the chief reason to believe that the defendant was operating under the influence of drugs or alcohol, or both, whereupon he ordered the defendant out of the car, placed him under arrest for operating under the influence, and gave him the warnings required by *Miranda* v. *Arizona*, *supra*. At this point, he ordered the defendant to walk up to the police cruiser, a task the defendant accomplished without assistance, but with some degree of staggering.

Responding to a call for assistance from the chief of police, an officer of the State police met him at the accident scene. After arranging to have the defendant's car towed to the State police barracks at Shelburne Falls, he returned to the barracks. The chief of police had transported the defendant to the same State police barracks for the purpose of having a breathalyzer test administered to the defendant. When the trooper arrived at the barracks, he read the defendant his

Miranda rights. He advised the defendant of his right to a breathalyzer test and of the consequences of his refusal to submit to the same, G. L. c. 90, § 24 (1) (*f*), of his right to a blood test by a physician of his own choice, and of his right to make a telephone call. The defendant agreed to submit to the breathalyzer test.

Prior to the administration of the test, the defendant attempted to retain the services of an attorney through the use of a coin operated telephone. In the course of the attempts to reach an attorney the defendant experienced some difficulty, dropping coins on the floor several times. There was evidence from the trooper that the defendant "bounce[d] around," "climb[ed] the walls," was scratching himself in an unusual way, and "didn't know what he was doing." After these attempts to reach an attorney were unsuccessful, the defendant took the test, the results of which were sufficient to invoke the statutory presumption that the defendant was driving under the influence of intoxicating liquor. G. L. c. 90, § 24 (l) (*e*).

At this point, the trooper prepared to place the defendant in a holding cell. Before doing so, the trooper searched the defendant's person and discovered what appeared to be a marihuana cigarette in the defendant's shirt pocket. The trooper then informed the defendant that he would also be charged with possession of marihuana. He gave the defendant his Miranda warnings once more. The defendant responded that he saw nothing wrong with the possession of one marihuana cigarette. The trooper then asked the defendant if he had any other marihuana on his person or in his car, and the defendant replied that he had some marihuana in his car. The defendant also stated that he could name some "biggies," to which the trooper replied that he did not wish to inquire any further.

Armed with the information gained from the defendant's statements, the trooper prepared an application for a search

warrant to search the defendant's vehicle, by then located at the State police barracks. The affidavit stated in material part: "On March 28, 1975 I assisted Chief Walter Zalenski [*sic*] Ashfield PD with a subject under arrest for operating under the influence. I gave the prisoner, Charles F. White his miranda [*sic*] rights. I than [*sic*] searched the prisoner and found (1) one marijuana cigarette in the breast pocket of his tee shirt colorgreen [*sic*]. I questioned the prisoner regarding the marijuana cigarette. He, Charles F. White, stated that he had some marijuana in his vehicle which he had been driving at the time of his arrest."

A warrant was issued on the basis of the affidavit. A search of the trunk of the vehicle pursuant thereto resulted in the discovery of a substantial quantity of controlled substances, related paraphernalia, such as glassine bags and cigarette wrappers and a strongbox containing a substantial amount of cash. It was this property as well as the defendant's statements that was the subject of the defendant's suppression motion.

The judge concluded that the defendant's statements must be suppressed as the Commonwealth had not met its heavy burden of demonstrating that the defendant had knowingly or intelligently waived his right to counsel or his privilege against self-incrimination. Relying primarily on *Commonwealth* v. *Hosey*, 368 Mass. (1975) [Mass. Adv. Sh. (1975) 2732], he reasoned that the defendant's condition precluded him from making an effective waiver. Despite this ruling, however, he declined to order the suppression of the physical objects, including the controlled substances seized in the defendant's car. The judge reasoned that the defendant's statements could be used in support of the application for the search warrant since he did not believe the policies behind the exclusionary rule would be furthered by its application in this context. He found that the officers were scrupulous in observing the defendant's rights and that the statement as to the location of the controlled substances in the vehicle did not come about as a result of police subterfuge or any purposeful attempt to subvert the defendant's rights.

The essence of the defendant's arguments here may be summarized as follows: (a) the judge correctly ordered the suppression of the defendant's inculpatory statements; (b) the judge correctly ruled that without the defendant's statements the application for the warrant failed to establish probable cause; and (c) since the warrant was invalid, the search of the car was illegal and the objects seized therein should have been suppressed. The Commonwealth's answer to these claims is that (a) the judge was wrong in ordering suppression of the defendant's statements; (b) the affidavit in support of the search warrant, even without such statements, demonstrates probable cause (contrary to the judge's ruling); and (c) if the warrant is ruled invalid, the search is still valid as a warrantless car search or, alternatively, as an inventory search of an impounded vehicle. We turn first to the threshold issue of the propriety of the suppression of the defendant's statements, and the effect thereof.

1. The Commonwealth appears to urge that we reexamine the factual determination of the judge relative to the suppression of the defendant's statements. The claim is that the judge erroneously found that the defendant did not intelligently and voluntarily waive his rights under *Miranda*. It has sought to distinguish *Commonwealth* v. *Hosey*, *supra*, relied on by the judge below, in numerous ways and point to our recent decision in *Commonwealth* v. *Fielding*, Mass. (1976) [Mass. Adv. Sh. (1976) 2290], as limiting the *Hosey* case to extreme circumstances of loss of cognitive ability.

It is well established that "'courts indulge every reasonable presumption against waiver' of fundamental constitutional rights," *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938), quoting

from *Aetna Ins. Co.* v. *Kennedy*, 301 U.S. 389, 393 (1937). Thus, when inculpatory statements are made by a defendant in a situation like that presented in the instant case, "a heavy burden rests on the [prosecution] to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel." *Miranda*, *supra* at 475. *Commonwealth* v. *Cain*, 361 Mass. 224, 228 (1972).

The Commonwealth's argument founders on the well established principle of appellate review that where, as here, subsidiary findings of fact have been made by a trial judge, they will be accepted by this court absent clear error. *Commonwealth* v. *Hosey*, *supra*. See *Commonwealth* v. *Murphy*, 362 Mass. 542 (1972). Such findings as to intelligent and voluntary waiver, or the absence thereof, are entitled to substantial deference by this court. *Commonwealth* v. *Roy*, 2 Mass. App. Ct. 14, 19 (1974). Having heard the evidence, the judge specifically found that the defendant had "affirmatively demonstrated a desire for the assistance of counsel" and had "at no time indicated . . . he had changed his mind" in that regard. The judge also found that the State trooper did not regard the defendant as having waived his right to silence or his right to counsel. On those facts alone it would be a difficult task for the Commonwealth to establish that the defendant had waived his right to counsel. *Brewer* v. *Williams*, 430 U.S. 387 (1977). If one considers, as did the judge, the evidence of the defendant's being under the influence, established through the breathalyzer test, and his behavior, it is clear that the more prudent and constitutionally preferable course would have been for the police to withhold any further questioning "until [the defendant] was clearly capable of responding intelligently." *Commonwealth* v. *Hosey*, *supra* at [Mass. Adv. Sh. (1975) at 2743]. While the case before us is not so compelling as was the situation in *Hosey*, we cannot

conclude that the judge erred in finding that the Commonwealth's heavy burden had not been satisfied.

2. It follows that we must then consider whether such statements, despite their inadmissability at trial, could be used for the purpose of establishing probable cause sufficient to obtain a valid search warrant. Unlike the trial judge, we conclude that they may not.

In *Commonwealth* v. *Hall*, 366 Mass. 790, 795 (1975), we recognized that evidence obtained in violation of constitutional guaranties against illegal search and seizure may not be considered in determining whether there was probable cause to obtain a warrant. More recently, in *Commonwealth* v. *Haas*, Mass. (1977) [Mass. Adv. Sh. (1977) 2212], we held that evidence obtained in violation of the principles laid down in *Miranda* v. *Arizona*, *supra*, may not be considered in determining whether there is probable cause to make an arrest and thus validate a search made incident to the arrest.

From these cases it follows that neither may such statements be used for the purpose of considering whether there was probable cause to obtain a search warrant. To hold otherwise would, in effect, sanction the initial violations of constitutional guaranties which the judge found took place in the police barracks. The need to prevent such violations from escaping review underlies the so called "fruit of the poisonous tree" doctrine set forth in *Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385 (1920), and *Nardone* v. *United States*, 308 U.S. 338 (1939). Although this exact issue has not been determined by the Supreme Court, but cf. *Michigan* v. *Tucker*, 417 U.S. 433 (1974), we believe that *Haas* controls the issue in this Commonwealth. The policies underlying the "fruits" doctrine in the search and seizure area are even more compelling in the instant case. Evidence obtained in violation of the guaranty against unreasonable searches and seizures is more often than not reliable, probative evidence. *Schneckloth* v.

Bustamonte, 412 U.S. 218, 250 (1973) (Powell, J., concurring). While evidence obtained in violation of the Miranda guidelines may be similarly probative and reliable, there is a far more significant danger that it will not be so. *Miranda* v. *Arizona*, *supra* at 447, 455 & n. 24.

3. The judge ruled that the existence of probable cause to support the search warrant "unquestionably depended upon the statement of the defendant, quoted in the affidavit, that the car did contain such contraband." We agree. It does not appear that the warrant, considered without the tainted evidence, is sufficient to establish probable cause. Cf. *Commonwealth* v. *Hall*, *supra*. Without the defendant's admission, the only evidence for the magistrate to consider was the allegation that the defendant was under arrest for driving under the influence and the marihuana cigarette was that found in his shirt pocket.

The lowest threshold of probable cause which we have previously accepted in a case of this kind was in *Commonwealth* v. *Miller*, 366 Mass. 387 (1974). In that case the facts were that the defendant was found with a small quantity of marihuana and uttered words which arguably indicated a consciousness of criminal conduct. A majority of the court found these facts sufficient to establish probable cause over the dissent of three Justices. In this case even less is present. Neither the possession of the small quantity of marihuana nor the fact that the defendant was thought to be operating under the influence of alcohol sufficiently establishes a nexus between the criminal activity sought to be investigated and the trunk of the vehicle. There is no necessary correlation between the untainted allegations in the affidavit and the presence of controlled substances in the defendant's car. At best, issuance of a warrant on such information alone would be a "hunch" on the part of the issuing magistrate, *Commonwealth* v. *Miller*, *supra* (Hennessey, J., dissenting), a level of

information not on a par with that required by the Constitution. This much was recognized by the judge and we see no reason to disagree.

4. This does not end our inquiry however. We indicated in *Commonwealth* v. *Blackburn*, 354 Mass. 200, 203 (1968), that a police officer should not be penalized for obtaining a search warrant, later ruled invalid, when there were adequate grounds to conduct a warrantless search. See *United States* v. *Darrow*, 499 F.2d 64, 68 (7th Cir. 1974). We consider whether the search here could be vindicated as a valid warrantless search.

In this case, no evidence was presented at the hearing on the motion which would justify this court in upholding the search as an inventory search, *South Dakota* v. *Opperman*, 428 U.S. 364 (1976);[1] *Cady* v. *Dombrowski*, 413 U.S. 433 (1973) (evidence of regular practice) or as the automobile equivalent of a "stop and frisk" search, *Commonwealth* v. *Almeida*, Mass. (1977) [Mass. Adv. Sh. (1977) 1799]. Nor can it be justified as a search incident to arrest. See *Chimel* v. *California*, 395 U.S. 752 (1969). Thus the search, if it is to be sustained at all, must be upheld as a permissible warrantless search of an automobile made on the basis of probable cause.

While the law concerning the proper parameters of warrantless automobile searches continues to be an area of vexing inconsistency and illogic, see *Commonwealth* v. *Haefeli*, 361 Mass. 271, 278 (1972), we have adhered to the view expressed in *Chambers* v. *Maroney*, 399 U.S. 42, 52 (1970), that "[f]or constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant. Given probable

[1] We intimate no opinion as to whether we would choose to follow the rule in *Opperman*, since it is not applicable to the facts here. See *State* v. *Opperman*, S.D. (1976) (247 N.W.2d 673 [1976]).

cause to search, either course is reasonable under the Fourth Amendment." See *Commonwealth* v. *Miller*, *supra* (Hennessey, J., dissenting). *Chambers* also allows such searches based on probable cause to be conducted at the station house as opposed to requiring that they be made at the scene where the police initially encounter the motor vehicle. However, we have understood *Chambers* read in conjunction with *Coolidge* v. *New Hampshire*, 403 U.S. 443 (1971), to require that the determination as to probable cause must be made at the time the automobile is first stopped, rather than on facts as may become available at a later time. *Commonwealth* v. *Rand*, 363 Mass. 554, 559 (1973). In this case, the facts available at the time of the first encounter would allow the officer to conclude that the defendant was driving under the influence of alcohol. Anything else was found at a point in time beyond that which we may permissibly consider under *Chambers* and *Coolidge*. *Commonwealth* v. *Rand*, *supra*. See, *United States* v. *Edwards*, 415 U.S. 800 (1974).

We do not believe that the mere fact that a person is apprehended for driving under the influence of an intoxicant is, without more, sufficient to allow a prudent man to conclude that a crime requiring a search of the automobile, its trunk, and the interior of a strongbox located therein has been committed. *Commonwealth* v. *Miller*, *supra* (Hennessey, J., dissenting). Cf. *United States* v. *Ragsdale*, 470 F.2d 24 (5th Cir. 1972). See *United States* v. *Chadwick*, U.S. (1977) [97 S. Ct. 2476 (1977). It therefore follows that a warrantless search cannot be considered permissible in these circumstances and that the judgments of the court below must be reversed.

Judgments reversed.
Findings set aside.

Appendix B.

Commonwealth of Massachusetts.
Superior Court.

COMMONWEALTH *vs.* CHARLES F. WHITE.

Nos. 5697-5700.

Findings and Rulings in re Motion to Suppress Evidence.

In this case the defendant is charged on all four indictments with possession with intent to distribute certain controlled substances. The defendant has filed a motion to suppress all oral or written statements taken from him at the time of and following his arrest. A pre-trial evidentiary hearing was held on the defendant's motion. On the basis of the evidence presented at that hearing I hereby find the following facts.

On March 28, 1975 at about 2:00 o'clock A.M., Chief of Police Walter D. Zalenski of the police department of the Town of Ashfield was notified that an automobile accident had occurred on Route 116 in that town. He proceeded to the scene and found a car which had gone off the road and over an embankment, hitting several posts. The defendant was behind the wheel of the car, trying to drive it back over the embankment and onto the highway. As Chief Zalenski approached the car, the defendant asked him to help, stating that he thought that with a "push" he could "make it over the embankment."

Chief Zalenski, however, noticed that the defendant appeared to be under the influence of either drugs, alcohol, or both. His eyes appeared glassy, his speech was somewhat slurred, and there was a strong odor of alcohol on his breath. The chief accordingly ordered him from the motor vehicle,

read him the Miranda warnings, and placed him under arrest. He told the defendant to follow him to his cruiser, and although the defendant staggered a bit as he did so, he was able to walk up the embankment without assistance. Chief Zalenski then called the Massachusetts State Police for assistance.

Trooper Frederick Taliaferro of the Massachusetts State Police responded to Chief Zalenski's call. When he arrived at the scene, the chief told him that the defendant was under arrest and asked him to give the defendant a breathalyzer test at the State Police Barracks. Both officers then proceeded to the barracks in their respective cruisers. Chief Zalenski took the defendant with him in his cruiser.

When the two officers and defendant arrived at the State Police barracks, Trooper Taliaferro read the Miranda warnings to the defendant and advised him of his right to use a telephone. He also informed him, in accordance with G.L. c. 90, § 24(l)(f), that his license to operate a motor vehicle would be suspended for 90 days if he refused to submit to a breathalyzer test. The defendant responded that he "might as well" take the test since, "I'll lose my license either way." He also attempted, however, to use a telephone in an effort to retain the services of a lawyer.

The defendant had some difficulty using the telephone. He dropped coins on the floor several times while attempting to do so. He did succeed in completing two calls, one to an attorney whom he asked to represent, but he was unable to obtain the services he sought. After a period of about 40-50 minutes, the breathalyzer test was administered by Trooper Taliaferro. The test indicated that the percentage, by weight, of alcohol in the defendant's blood was, at that time, thirteen one hundredths.[1]

[1]The results of the test created a statutory presumption that the defendant was under the influence of intoxicating liquor. G.L. c. 90, § 24(l)(e).

After the breathalyzer test was completed, Trooper Taliaferro prepared to place the defendant in a cell. Before doing so he searched the defendant's person and found what appeared to be a marijuana cigarette in his shirt pocket. At that time the officer told him that he would also be charged with possession of marijuana, and he again read the Miranda warnings to him. The defendant responded that he saw nothing wrong in the possession of one marijuana cigarette. The officer then asked him if he had any other marijuana on his person or in his car, and the defendant responded that he had more marijuana in his car. The defendant then stated that he could name some "biggies"[2], but Trooper Taliaferro told him that he did not want him to say anything further.

After the defendant was secured in a cell, Trooper Taliaferro prepared an application for a search warrant and an affidavit in support of that application. The affidavit read, in material part, as follows:

> "On March 28, 1975 I assisted Chief Walter Zalenski [sic] Ashfield PD with a subject under arrest for operating under the influence. I gave the defendant, Charles F. White his miranda rights. [sic]. I than [sic] searched the prisoner and found (1) marijuana cigarette in the breast pocket of his tee shirt colorgreen [sic]. I questioned the prisoner regarding the marijuana cigarette. He, Charles F. White stated that he had some marijuana in his vehicle which he had been driving at the time of his arrest."

A warrant for a search of the defendant's motor vehicle was issued on the basis of the application and the supporting af-

[2]The defendant was apparently referring to certain drug dealers whom he was willing to identify in exchange for leniency.

fidavit. Upon a search of the vehicle a substantial quantity of various controlled substances plus $3,195.00 in cash[3] was discovered in the vehicle's trunk. That property was seized and is, together with the defendant's oral statements to Trooper Taliaferro, the subject of the motion to suppress evidence.

1. I am unable to find that the Commonwealth has met its "heavy burden" of demonstrating that this defendant had knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel at the time when he supplied Trooper Taliaferro with the incriminating information with regard to the presence of controlled substances in his motor vehicle. In the first place, he had affirmatively demonstrated a desire for the assistance of counsel and had placed at least two telephone calls in an attempt to obtain such assistance. Although his attempts were unsuccessful (not surprising in view of the hour), he at no time indicated that he intended to abandon his efforts or that he had changed his mind with regard to that objective. Furthermore, it is apparent from Trooper Taliaferro's reaction that the officer did not regard the defendant as having waived his right to silence or his right to counsel. When the defendant offered to reveal the identity of certain alleged "biggies," the officer declined to question him further. That declination was made, I believe, in deference to the defendant's constitutional rights. Finally, the defendant was clearly under the influence of intoxicating liquor at the time when he made the inculpatory statement. Trooper Talliaferro described him as "bouncing off the walls," and the breathalyzer reading was sufficiently high to create a statutory presumption of intoxication. The Supreme Judicial Court has made it clear that when a suspect has been brought in on a charge of drunkenness, the

[3]The cash was found in a strong box which was found in the trunk.

police should not proceed with questioning on the basis of a waiver of *Miranda* rights until the suspect is "clearly capable of responding intelligently." (*Commonwealth* v. *Hosey*, 1975 A.S. 2732, ____ N.E. 2d ____). The same rule must apply when the suspect has been brought in on a charge of driving under the influence of either liquor or narcotic drugs. In this case that test had not been met when the defendant made his inculpatory statements. It follows that those statements must be suppressed as evidence at his trial.

2. A different issue, however, is presented by the motion insofar as it seeks suppression of the narcotic drugs and currency which were discovered in the trunk of the defendant's car. That property was discovered and seized in the course of a search that was authorized by a warrant issued by a duly-authorized magistrate. The affidavit that provided the basis for the issuance of that warrant clearly, I think, established probable cause to believe that the automobile which was the subject of the search contained contraband which was subject to such seizure. The existence of such probable cause, however, unquestionably depended upon the statement of the defendant, quoted in the affidavit, that the car did contain such contraband — and that statement was obtained in violation of the defendant's Miranda rights. The question, I therefore suppose, is whether the results of the search must also be suppressed as "fruits of the poisonous tree." I do not think so.

In the first place, I am aware of no decision, binding upon me, in which it has been held that a statement obtained in violation of a suspect's *Miranda* rights may not be used to establish probable cause for the issuance of an otherwise valid search warrant. The industry of counsel on both sides of this particular issue has been unable to disclose a decision on that precise point. I am, of course, aware of the decision of the Supreme Court of the United States in *Wong Sun* v. *United*

States, 371 U.S. 471, but that case involved the reverse of the situation with which I am now faced. In *Wong Sun*, the product of a clearly illegal arrest and search was an inculpatory admission by the defendant. The same was true in the more recent case of *Brown* v. *Illinois*, ____ U.S. ____, 45 L. Ed. 2d 416, 95 S. Ct. ____ (June 26, 1975). In this case, a statement by the defendant (obtained in violation of *Miranda*) provided the probable cause for the issuance of an otherwise valid warrant.

The holding of the Supreme Court in *Miranda* (*Miranda* v. *Arizona*, 384 U.S. 434, 86 S.Ct. 1602, 16 L. Ed. 2d 694) did not expressly preclude the use of statements obtained without a knowing, intelligent and voluntary waiver of the prescribed warnings as a basis for probable cause for the issuance of a valid warrant. In that case the court promulgated a set of safeguards to protect the delineated constitutional rights of persons subjected to custodial police interrogation and held that unless law enforcement officers give certain specified warnings before questioning a person in custody, and follow certain specified procedures during the course of any subsequent interrogation, any statement made by the person in custody cannot over his objection be admitted in evidence against him *as a defendant at trial*, even though the statement may in fact be wholly voluntary. *Michigan* v. *Mosely*, ____ U.S. ____, 96 S. Ct. 321 (December 9, 1975). The court did not discuss the possibility that such statements could not be used for other purposes. I do not, however, regard that distinction as controlling. The basic purpose of the *Miranda* holding is to protect the individual's Fifth Amendment privilege against compelled testimonial self-incrimination unless the privilege is "knowingly and intelligently" waived, in recognition of the fact that custody creates an inherent compulsion on an individual to incriminate himself in response to questions. A statement which provides probable cause for a

subsequent search of a suspect's home or motor vehicle is, when the search results in the discovery and seizure of incriminating evidence, a self-incriminating statement in any real sense. I assume that there might be cases in which the interests of the integrity of the judicial process would require suppression, not only of the statement, but also of the fruits of the subsequent search. I do not believe, however, that this is such a case.

The exclusionary rule that precludes the admission in evidence of illegally obtained evidence is designed to deter police from violating the constitutional rights of persons suspected of crime. Thus, an involuntary statement coerced from a defendant may not be used as evidence against him, no matter how accurate the contents of the statement may prove to be. The *Miranda* holding extends that principle to exclude even voluntary statements of a suspect in custody, unless that suspect has been given the specified warnings and has waived his right to silence and to the assistance of counsel. I do not believe, however, that the prophylactic approach of *Miranda* must or should be extended to exclude evidence obtained as an indirect result of a suspect's in-custody statement, where there has been no purposeful attempt to subvert the defendant's rights. Compare *Brown* v. *Illinois*, *supra*.

The Supreme Court of the United States has stated in *Nardone* v. *United States*, 308 U.S. 338, 84 L.Ed. 307, 60 S.Ct. 266:

> "We need not hold that all evidence is 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is 'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.'"

That language was recently quoted with approval in *Brown* v. *Illinois, supra.*

The court has also said,

> "Despite its broad deterrent purpose, the exclusionary rule has never been interpreted to proscribe the use of illegally seized evidence in all proceedings." *United States* v. *Callandra*, 414 U.S. 338, 348.

And, more to the point in my opinion:

> "The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in wilful, or at the very least negligent conduct which has deprived the defendant of his rights. Where the officer's conduct was pursued in complete good faith, however, the deterrence rationale loses much of its force." *Michigan* v. *Tucker*, 417 U.S. 433, 447.

In this case the arresting officers were scrupulous in their efforts to obey the mandate of *Miranda*. The defendant's rights were read to him on no less than three occasions, and the officers made no attempt whatever to interrogate him with regard to the crime for which he was initially arrested. The only interrogation of the defendant consisted of a single question which was put to him after the marijuana cigarette was discovered in his shirt pocket, and after he had been read the warnings for the third time. Furthermore, that question was in response to an unsolicited statement by the defendant to the effect that he did not regard possession of the single cigarette as a crime. It is noteworthy, I think, that Trooper Talliaferro refused to extend the conversation, although the defendant

offered to volunteer further information which might well have led to further self-incrimination. I am satisfied that Trooper Talliaferro asked the single question as a natural consequence of the immediately preceding events, and without any conscious intent to deny the defendant his right to silence or his right to the assistance of counsel.

Although I am unable to find that the defendant had "knowingly and intelligently" waived his right to silence or to the assistance of counsel when he stated that more marijuana could be found in his vehicle, it is clear that no actual coercion, other than that inherent in his in-custody status, was applied by the police to obtain that information. As noted above, the information was given in response to a single question and in the course of a short conversation initiated by the defendant himself. Under these circumstances, I do not believe that exclusion of the evidence seized from the defendant's vehicle would serve as a deterrent to future police misconduct, for there was no conscious police misconduct in this case. Exclusion of this evidence could only serve to defeat the ends of justice with no corresponding benefit to the integrity of our judicial system. I do not believe that *Miranda* should or will be stretched that far.

Accordingly, it is ordered

(1) That the motion to suppress evidence, insofar as it related to any oral statements made by the defendant while in custody, is allowed.

(2) That the motion to suppress evidence, insofar as it relates to the property seized from the defendant's motor vehicle in the execution of the search warrant, is denied.

JOHN F. MORIARTY,
Justice of the Superior Court.

Entered: January 29, 1976.

Appendix.

In the Supreme Court of the United States.

OCTOBER TERM, 1977.

No. 77-1388.

COMMONWEALTH OF MASSACHUSETTS,
PETITIONER,

v.

CHARLES F. WHITE,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS.

Petition for Writ of Certiorari Filed March 30, 1978.

Certiorari granted May 30, 1978.

Table of Contents.

COMMONWEALTH OF MASSACHUSETTS.

Superior Court.

FRANKLIN COUNTY.

COMMONWEALTH

v.

CHARLES F. WHITE.

Docket Entries.

DOCKET ENTRIES, No. 5697.

1975		
September		
9	(1)	Indictment returned, Lynch, J.
17	(2)	Appearance of Stephen Silverman, Esq. for defendant filed. Defendant pleads not guilty and released on personal recognizance. Defendant recognizes with Paul Kingston, Probation Officer, in the sum of $300 (with surety). Defendant given ten days to file special pleadings, Lynch, J.
25	(3)	Defendant's motion to suppress filed.
October		
1	(4)	Defendant's motion to continue hearing on motion to suppress filed and allowed, Lynch, Jr., J.

1975

October

7 (5) Defendant's motion for return of property seized filed.

1976

January

29 (6) Defendant's motion to suppress allowed as to oral statements made by defendant while in custody and denied as to property seized from defendant's motor vehicle. Findings and Rulings in re motion to suppress evidence entered.

February

4 (7) Defendant's exception to "Findings and Rulings in re motion to suppress evidence filed.

May

20 (8) Defendant's waiver of jury trial and defendant's motion to make proceedings subject to Chapter 278, Sections 33A-33G filed and allowed, Cross, J.

(9) After trial, Court finds the defendant guilty and

(10) Finding of guilty entered, Cross, J.

(11) Commonwealth's motion to forfeit money pursuant to G.L. Chapter 276, Section 3(d) filed. (11A) Stipulation regarding disposition of certain evidence filed.

26 Court orders case placed on file, Cross, J. Defendant consents thereto.

1976

June

9 (12) Defendant's claim of appeal filed. (D.A. notified C. 278, S. 33B)

July

1 (13) Defendant's motion to be furnished copy of transcript and (14) motion to stay execution of sentence pending appeal filed.

15 Writ of habeas corpus issued (to Northampton).

22 Defendant's motion to be furnished copy of transcript allowed, Cross, J. (at Northampton) Motion to stay execution of sentence pending appeal denied, Cross, J.

August

5 (15) Order for transcript of proceedings and evidence entered, Cross, J.

September

10 (16) Appearance of Robert S. Cohen, Esq. for defendant filed.

16 (17) Motion for leave to withdraw filed.

(18) Notice of withdrawal of appearance of Stephen W. Silverman filed.

October

18 Copy of transcript received. (2 copies)

November

16 Summary of the record completed, parties notified.

26 (19) Defendant's designations for the record and (20) Assignment of error filed.

1976
December
3 Attorney Stephen W. Silverman's motion to withdraw appearance allowed, Moriarty, J.

DOCKET ENTRIES, No. 5698.

1975
September
9 (1) Indictment returned, Lynch, J.
17 Appearance of Stephen W. Silverman, Esq. for defendant filed. Defendant pleads not guilty and released on personal recognizance. Defendant recognizes with Paul Kingston, Probation Officer, in the sum of $300 (with surety). Defendant given ten days to file special pleadings, Lynch, J. (#5697)
25 Defendant's motion to suppress filed. (See #5697)

October
1 Defendant's motion to continue hearing on motion to suppress filed and allowed, Lynch, Jr., J. (see #5697)
7 Defendant's motion for return of property seized filed. (see #5697)

1976
January
29 Defendant's motion to suppress allowed as to oral statements made by defendant while in custody and denied as to property seized from defendant's motor vehicle. Findings and Rulings in Re Motion to Suppress Evidence entered.

February
4 Defendant's exception to "Findings and Rulings in re motion to suppress evidence" filed. (see 5697)

May
20 Defendant's waiver of jury trial and motion to make subject to Chapter 278, Sections 33A-33G filed and allowed, Cross, J.
After trial, Court finds the defendant guilty and (2) Finding of guilty entered, Cross, J.
Commonwealth's motion to forfeit money pursuant to G.L. Chapter 276, sec. 3(d) filed.
26 Defendant sentenced to Massachusetts Correctional Institution, Walpole for a term of not more than seven years nor less than five years (credit of seven days awaiting sentencing), Cross, J. Warrant issued.

June
1 (3) Defendant's appeal from sentence to MCI Walpole filed. Copy of indictment and docket entries to

1976

June

1 Appellate Division, Boston; notified Chief Justice McLaughlin and Judge Raymond R. Cross.

9 Defendant's claim of appeal filed.

July

1 Defendant's motion to be furnished copy of transcript and motion to stay execution of sentence pending appeal filed. (5697)

15 Writ of habeas corpus issued (to Northampton).

22 Defendant's motion to be furnished with copy of transcript allowed, Cross, J. and Motion to stay execution of sentence pending appeal denied. Cross, J. at Northampton.

September

10 Appearance of Robert S. Cohen, Esq. for defendant filed. Motion for leave to withdraw filed.

16 Notice of withdrawal of appearance of Stephen W. Silverman filed.

October

18 Copy of transcript received.

November

16 Summary of the record completed, parties notified.

26 Defendant's designations for the record and Assignment of error filed. (5697)

1976

December

2 (4) Order that the judgment imposing said sentence stand and appeal to Apellate Division re sentence be dismissed entered by the Appellate Division.

3 Attorney Stephen W. Silverman's motion to withdraw appearance allowed, Moriarty, J.

DOCKET ENTRIES, No. 5699.

1975

September

9 (1) Indictment returned, Lynch, J.

17 Appearance of Stephen W. Silverman, Esq. for defendant filed. Defendant pleads not guilty and released on personal recognizance. Defendant recognizes with Paul Kingston, Probation Officer, in the sum of $300 (with surety). Defendant given ten days to file special pleadings, Lynch, J. (#5697)

25 Defendant's motion to suppress filed. (see #5697)

October

1 Defendant's motion to continue hearing on motion to suppress filed and allowed, Lynch, Jr., J. (see 5697)

7 Defendant's motion for return of property seized filed. (see 5697)

1976

January

29 Defendant's motion to suppress allowed as to oral statements made by defendant while in custody and denied as to property seized from defendant's motor vehicle. Findings and Rulings in Re Motion to Suppress Evidence entered.

February

4 Defendant's exception to "Findings in re motion to suppress evidence" entered.

May

20 Defendant's waiver of jury trial and motion to make subject to Chapter 278, Sec. 33A-33G filed and allowed, Cross, J. After trial, Court finds the defendant guilty and (2) Finding of guilty entered, Cross, J. Commonwealth's motion to forfeit money pursuant to G.L. Chapter 276, Sec. 3(d) filed.

26 Defendant sentenced to Massachusetts Correctional Institution, Walpole, for a term of not more than seven years nor less than five years (credit of seven days awaiting sentencing), concurrent with sentence in case No. 5698, Cross, J. Warrant issued.

1976

June

1 (3) Defendant's appeal from sentence to MCI Walpole filed. Copy of indictment and docket entries to Appellate Division, Boston; notified Chief Justice McLaughlin and Judge Raymond R. Cross.

9 Defendant's claim of appeal filed.

July

1 Defendant's motion to be furnished copy of transcript and motion to stay execution of sentence pending appeal filed. (5697)

12 Writ of habeas corpus issued (to Northampton).

22 Defendant's motion to be furnished with copy of transcript allowed, Cross, J. and motion to stay execution of sentence pending appeal denied, Cross, J. at Northampton.

August

5 Order for transcript of proceedings and evidence entered, Cross, J. (copy to Bertha B. Smith, Stenographer)

September

10 Appearance of Robert S. Cohen, Esq. for defendant filed.

16 Motion for leave to withdraw filed. Notice of withdrawal of appearance of Stephen W. Silverman filed.

1976	
October	
18	Copy of transcript filed.
November	
16	Summary of the record completed, parties notified.
26	Defendant's designations for the record and Assignment of error filed.
December	
2	Order that the judgment imposing said sentence stand and appeal to Appellate Division re sentence be dismissed entered by the Appellate Division.
3	Attorney Stephen W. Silverman's motion to withdraw appearance allowed, Moriarty, J.

DOCKET ENTRIES, No. 5700.

1975	
September	
9	(1) Indictment returned, Lynch, J.
17	Appearance of Stephen W. Silverman, Esq. for defendant filed. Defendant pleads not guilty and released on personal recognizance. Defendant recognizes with Paul Kingston, Probation Officer, in the sum of $300 (with surety). Defendant given ten days to file special pleadings, Lynch, J. (#5697)

1975	
September	
25	Defendant's motion to suppress filed. (see #5697)
October	
1	Defendant's motion to continue hearing on motion to suppress filed and allowed, Lynch, Jr., J. (see 5697)
7	Defendant's motion for return of property seized filed. (see 5697)
1976	
January	
29	Defendant's motion to suppress allowed as to oral statement made by defendant while in custody and denied as to property seized from defendant's motor vehicle. Findings and Rulings in re motion to suppress evidence entered.
February	
4	Defendant's claim of exception to "Findings & Rulings in re motion to suppress evidence" entered. (see 5697)
May	
20	Defendant's waiver of jury trial and motion to make subject to Chapter 278, Sections 33A-33G filed and allowed, Cross, J. After trial, Court finds the defendant guilty and (2) Finding of guilty entered, Cross, J.

1975

May

20 Commonwealth's motion to forfeit money pursuant to G.L. Chapter 276, Sec. 3(d) filed.

26 Defendant sentenced to Massachusetts Correctional Institution, Walpole, for a term of not more than seven years nor less than five years (credit of 7 days awaiting sentencing), concurrent with sentence in case No. 5698, Cross, J. Warrant issued.

June

1 (3) Defendant's appeal from sentence to MCI Walpole filed. Copy of indictment and docket entries to Appellate Division, Boston; notified Chief Justice McLaughlin and Judge Raymond R. Cross.

9 Defendant's claim of appeal filed.

July

1 Defendant's motion to be furnished copy of transcript and motion to stay execution of sentence pending appeal filed. (5697)

12 Writ of habeas corpus issued (to Northampton).

22 Defendant's motion to be furnished with copy of transcript allowed, Cross, J. and motion to stay execu-

1976

July

22 tion of sentence pending appeal denied, Cross, J., at Northampton.

September

16 Motion for leave to withdraw and notice of withdrawal of appearance of Stephen W. Silverman filed; Appearance of Robert S. Cohen, Esq. for defendant filed.

October

18 Copy of transcript filed.

November

16 Summary of record completed, parties notified.

1976

November

26 Defendant's designations for the record and Assignment of error filed. (5697)

December

2 (4) Order that the judgment imposing sentence of not more than seven years nor less than five years to MCI, Walpole be amended to not more than five years nor less than four years entered by the Appellate Division of the Superior Court for the review of sentences.

3 Attorney Stephen W. Silverman's motion to withdraw appearance allowed, Moriarty, J.

COMMONWEALTH OF MASSACHUSETTS.

SUPERIOR COURT.

FRANKLIN COUNTY.

[Title omitted in printing.]

Indictment No. 5697.

At the Superior Court, holden at Greenfield, within and for the County of Franklin, for the transaction of criminal business on the second Monday of September in the year of our Lord one thousand nine hundred and seventy-five.

The Jurors for the said Commonwealth, on their oath present, That Charles F. White of Seekonk in the County of Bristol, on or about the 28th day of March in the year of our Lord one thousand nine hundred and seventy-five at Ashfield, in the County of Franklin, not then and there being specifically excepted under Chapter 94C of the General Laws, knowingly and intentionally did unlawfully have in his possession with intent to distribute a controlled substance, to wit: Marijuana as described in Class D of section 31 of Chapter 94C of the General Laws.

A TRUE BILL

JOHN M. FINN,
Assistant District Attorney,

MICHAEL R. SKIBISKI,
Foreman.

COMMONWEALTH OF MASSACHUSETTS.

SUPERIOR COURT.

FRANKLIN COUNTY.

[Title omitted in printing.]

Indictment No. 5698.

At the Superior Court, holden at Greenfield, within and for the County of Franklin, for the Transaction of criminal business on the second Monday of September in the year of our Lord one thousand nine hundred and seventy-five.

The Jurors for the said Commonwealth, on their oath present, That Charles F. White of Seekonk in the County of Bristol, on or about the 28th day of March in the year of our Lord one thousand nine hundred and seventy-five at Ashfield, in the County of Franklin, not then and there being specifically excepted under Chapter 94C of the General Laws, knowingly and intentionally did unlawfully have in his possession with intent to distribute a controlled substance, to wit: Cocaine as described in Class B of section 31 of Chapter 94C of the General Laws.

A TRUE BILL.

JOHN M. FINN,
Assistant District Attorney.

MICHAEL R. SKIBISKI,
Foreman.

COMMONWEALTH OF MASSACHUSETTS.

SUPERIOR COURT.

Franklin County.

[Title omitted in printing.]

Indictment No. 5699.

At the Superior Court, holden at Greenfield, within and for the County of Franklin, for the transaction of criminal business on the second Monday of September in the year of our Lord one thousand nine hundred and seventy-five.

The Jurors for the said Commonwealth, on their oath present, That Charles F. White of Seekonk in the County of Bristol, on or about the 28th day of March in the year of our Lord one thousand nine hundred and seventy-five at Ashfield, in the County of Franklin, not then and there being specifically excepted under Chapter 94C of the General Laws, knowingly and intentionally did unlawfully have in his possession with intent to distribute a controlled substance, to wit: Amphetamines as described in Class B of section 31 of Chapter 94C of the General Laws.

A TRUE BILL.

JOHN M. FINN,
Assistant District Attorney.

MICHAEL R. SKIBISKI,
Foreman.

COMMONWEALTH OF MASSACHUSETTS.

SUPERIOR COURT.

FRANKLIN COUNTY.

[Title omitted in printing.]

Indictment No. 5700.

At the Superior Court, holden at Greenfield, within and for the County of Franklin, for the transaction of criminal business on the second Monday of September in the year of our Lord one thousand nine hundred and seventy-five.

The Jurors for the said Commonwealth, on their oath present, That Charles F. White of Seekonk in the County of Bristol, on or about the 28th day of March in the year of our Lord one thousand nine hundred and seventy-five at Ashfield, in the County of Franklin, not then and there being specifically excepted under Chapter 94C of the General Laws, knowingly and intentionally did unlawfully have in his possession with intent to distribute a controlled substance, to wit: LSD (d-Lysergic Acid Diethylamide) as described in Class C of section 31 of Chapter 94C of the General Laws.

A TRUE BILL.

JOHN M. FINN,
Assistant District Attorney.

MICHAEL R. SKIBISKI,
Foreman.

COMMONWEALTH OF MASSACHUSETTS.

SUPERIOR COURT.

FRANKLIN COUNTY. Nos. 5697-5700.

[Title omitted in printing.]

Motion to Suppress.

Now comes the defendant and moves that all evidence seized from a 1960 Chevrolet Hardtop, Mass. Reg. No. 2M9926, on or about March 28, 1975, pursuant to a search warrant dated March 28, 1975, issued by the District Court of Franklin, be suppressed for the reason that said search and seizure was illegal and in violation of defendant's right to be secure from an unreasonable search and seizure as guaranteed by the FOURTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, in violation of ARTICLE FOURTEEN of the DECLARATION OF RIGHTS OF THE CONSTITUTION OF MASSACHUSETTS and in violation of the provisions of Massachusetts General Laws, c. 276, Sects. 1-3D as amended. Said search and seizure was illegal for the following reasons:

1. The affidavit in support of the search warrant fails to disclose that the defendant voluntarily and knowingly waived his constitutional privilege against self-incrimination before being questioned by the State Police trooper which interrogation allegedly led to the information upon which the search warrant was sought.

The defendant, CHARLES F. WHITE, moves that all oral or written statements taken from him by the police following his arrest on or about March 28, 1975, be suppressed as in violation of the defendant's right against self-incrimination

as guaranteed by the FIFTH and FOURTEENTH AMENDMENTS to the CONSTITUTION OF THE UNITED STATES and ARTICLE XII of the CONSTITUTION OF MASSACHUSETTS. Said statements were illegal for the following rights [*sic*].

1. The defendant did not knowingly or voluntarily waive his miranda rights.
2. The defendant was not represented by counsel nor did he waive his right to counsel prior to being questioned.

DEFENDANT,

By STEPHEN W. SILVERMAN.

Filed September 25, 1975, and, after hearing, allowed as to oral statements made while in custody, denied as to property seized (Moriarty, J.) January 29, 1976.

COMMONWEALTH OF MASSACHUSETTS.

SUPERIOR COURT.

FRANKLIN COUNTY. Nos. 5697-5700.

[Title omitted in printing.]

Affidavit in Support of Motion to Suppress.

I, CHARLES F. WHITE, on oath state that I am the defendant in the above indictments charging violation of the controlled substances act and that I was arrested on or about March 28, 1975 by the Ashfield Police Department

and the Mass. State Police while operating a motor vehicle. Subsequently, I took a breathalyzer test which resulted in a reading of .13. Prior to being searched at the police barracks, I attempted to telephone a lawyer to get advice concerning my arrest. Due to my condition, I was unable to operate the telephone. I was then searched and a small quantity of marijuana was found in my shirt. Following this search, I again attempted without success to use the telephone to contact a lawyer. I never was aware that I waived any constitutional rights and in fact wished to exercise my right to have counsel present during any questioning and to remain silent.

Signed under oath and penalties of perjury.

CHARLES F. WHITE.

Filed October 7, 1975.

COMMONWEALTH OF MASSACHUSETTS.

SUPERIOR COURT.

FRANKLIN COUNTY. Nos. 5697-5700.

[Title omitted in printing.]

Supplemental Affidavit in Support of Motion to Suppress.

I, CHARLES F. WHITE, on oath state that at the time of my arrest on March 28, 1975 I was under the influence of alcohol and also under the influence of drugs and that this

condition continued following my arrest and during the time I was at the police barracks while I was attempting to telephone a lawyer or friend to help me contact a lawyer and while I was being questioned by the police relative to the marijuana found in my pocket. My answers to questions led to the issuance of a search warrant which was used to search the trunk of my vehicle which had been towed to the police barracks and wherein the controlled substances shown on the return of the warrant were seized.

Signed under oath and the penalties of perjury this September 29, 1975.

CHARLES F. WHITE.

Filed October 7, 1975.

COMMONWEALTH OF MASSACHUSETTS.

SUPERIOR COURT.

FRANKLIN COUNTY. Nos. 5697-5700.

[Title omitted in printing.]

Hearing on Motion to Suppress
and
Motion for Return of Property.

[4] January 12, 1976

Morning Session

[Court in at 9:30 a.m. Defendant and all counsel present.]

MR. FINN: Your Honor, on Indictments No. 5697 through 5700, the Commonwealth v. Charles F. White, the Commonwealth is ready to proceed on a motion to suppress and a parallel motion for return of property.

THE COURT: Do you have a copy of the motions?

[Mrs. Pekenia hands papers to Court.]

MR. SILVERMAN: There is a motion to suppress, to return property, and two affidavits.

THE COURT: I have a motion to suppress, motion for return of property. There is a supplemental affidavit, one document entitled "Motion for Return of Property" and an affidavit.

MR. SILVERMAN: There are two affidavits going with the motion to suppress.

THE COURT: I have an affidavit and a supplemental affidavit.

MR. SILVERMAN: Yes. I have a short memorandum. I gave a copy of it to the District Attorney. Some of the cases I think might have bearing on this motion.

[Mr. Silverman hands papers to the Court.]

[5] MR. SILVERMAN: There is one witness, a State Trooper, not here yet, but is it all right to go ahead and expect him at 10 o'clock? I understand we do have the Chief here and the defendant is here.

THE COURT: We will proceed with the Chief.

[6] *WALTER D. ZALENSKI, Sworn*

Direct Examination by Mr. Silverman

Q. Will you tell us your name and occupation.

A. Walter Zalenski, Chief of Police, Ashfield.

Q. Were you the Chief of Police in March, 1975?

A. I was.

Q. Chief, on March 28, 1975, did you have occasion to investigate a vehicle in Ashfield?

A. I did.

Q. Can you tell us the circumstances of that.

A. I received a call at approximately 2:00 a.m. in the morning to investigate an automobile accident on Route 116 in South Ashfield. I proceeded to investigate the accident, and there is where I found the accident, and in South Ashfield a car had gone over a bank and hit several posts, and that is where I found the defendant, Charles White, in the car.

Q. Was he alone in the car?

A. He was.

Q. Tell us what you did when you approached the car.

A. I walked up to the car, and he was sitting behind the wheel, trying to get the car out of the embankment, and he asked me — said, "If you give me a push, I think I can make it," but I saw the situation where he couldn't get out of [7] there and I told him. I noticed he was under the influence of something at the time, and I asked him if he would please shut off the motor and come with me. He didn't give me any resistance. I opened the door and walked up to the car with him. I gave him his rights. He answered me in a way he understood what I was talking about, and I proceeded to put him in the cruiser and take him in, and about this time —

Q. Could I stop you for a minute?

A. Yes.

Q. What caused you to conclude he was under the influence of something?

A. Well, his eyes were glassy and his speech was somewhat slurred, and when he walked to the car he staggered.

Q. Would you say he had difficulty standing when he got out of the car?

A. Not necessarily, because he walked up the bank all right. There was sort of an incline and he seemed to climb up that all right.

Q. Did you testify at the probable cause hearing he had trouble standing when he got out of the car?

A. I might have, I can't remember. I might have said he staggered.

Q. Did you notice an odor of any substance?

A. Yes, a very strong odor of an alcoholic beverage.

[8] Q. Sometime did you accompany the defendant to the State Police barracks?

A. I did.

Q. Located where?

A. On Route 2, Shelburne Falls.

Q. In the presence of a State Police cruiser or by yourself?

A. He was in the cruiser alone and the State Trooper followed me, because he had the report of an accident. He was looking for us also and he accompanied me to the barracks.

Q. The defendant in your cruiser?

A. Yes.

Q. And would you tell us what happened at the State Police barracks.

A. We again gave him his rights, Trooper Taliaferro gave him his rights and asked him if he would take a breathalyzer test.

Q. Were you in the defendant's presence when the Trooper gave him his rights?

A. Yes.

Q. Can you give us an indication of what particular rights?

A. The Miranda warning and also gave him the right he had the refusal of the breathalyzer test if he wished, and the [9] procedure that they do give the defendants that are brought in under the influence.

Q. Was one of those rights the right to have a blood test at his own expense?

A. Yes.

Q. Did he say anything to him about a phone call?

A. Yes, he did, and as I remember, he did, he said that he could make a phone call.

Q. And Chief, did the defendant in fact make an effort to make a phone call?

A. Yes.

Q. Did you witness that?

A. I was standing off. The Trooper was standing beside him. I was standing off at a distance, but I was in the room when he was using the pay phone.

Q. Would you tell us what happened.

A. He tried to use the telephone. He had a little bit of a problem to use the phone. As I remember, he did make contact with someone. I heard him mention that roughly, that "I have to get ahold of somebody legally, he will not represent me," or something to that effect; I wasn't that close to him. I heard him make that remark.

Q. What is your opinion, that he was probably talking to a lawyer?

[10] A. Yes.

Q. And did it also appear to you he was not having success getting whoever the individual was to represent him?

A. That is right.

Q. Did he have difficulty in the physical act of making the phone call?

A. Yes, he dropped the money several times and had trouble picking it up, and one time he picked it up and he dropped it on the floor.

Q. Did he make another effort to use the phone while there, as far as you know?

A. Yes, he did, but as I say, I was standing off at this particular time, I can't actually testify as to his reaction to making that call.

Q. To the best of your knowledge, did he succeed in making contact with only the one person you have already mentioned?

A. To my knowledge, yes.

Q. Sometime at State Police barracks was the defendant searched, do you know?

A. Yes, he was.

Q. Was anything unusual uncovered as a result of that search?

A. Yes, what we call a reefer was found on him, a [11] marijuana cigaret.

Q. A single marijuana cigaret?

A. Yes.

Q. Do you know where that was found?

A. In his shirt, in an inside pocket.

Q. Was it the State Trooper that did the search?

A. Yes.

Q. Following the search and the discovery of the cigaret, to your knowledge did the State Trooper have conversation with the defendant regarding the cigaret?

A. He did.

Q. Can you tell us what the conversation was?

A. He was talking to him, and he said, "Do you have any more?" and he said there wasn't anything wrong in having those on him, and he said —

THE COURT: I am sorry, will you repeat that.

THE WITNESS: He said something like he didn't see anything wrong with having one of those on him.

THE COURT: The defendant?

THE WITNESS: Yes, something to that effect, and he asked him, "Do you have any more of these around?" and after a few seconds he said yes, he did, he had some in his car.

Q. Now, as a result of that conversation that the [12] State Trooper had with the defendant and the defendant indicating there was more marijuana in the car, was a search warrant obtained?

A. Yes, there was. We obtained a search warrant that morning at court.

Q. Which court?

A. Greenfield District Court.

Q. That wouldn't be part of the papers here, would it, the application for the search warrant?

[Mr. Finn hands paper to Mr. Silverman.]

Q. Is this the affidavit that was used in applying for the search warrant?

A. The Trooper, you understand —

Q. I understand the Trooper signed the application.

A. I couldn't rightfully testify, but I can testify that is the automobile and the Trooper.

Q. Are the facts in that affidavit as you remember them, as far as the defendant saying he had some marijuana in the vehicle?

A. Yes.

Q. Any question in your mind that is the affidavit used to obtain the search warrant?

A. Is that the affidavit? Yes.

Q. And the search warrant was issued at that time?

[13] A. Yes, it was.

MR. SILVERMAN: I would like to offer the affidavit that is dated March 28, 1975.

THE COURT: The affidavit will be defendant's Exhibit M-#1 and the search warrant will be defendant's Exhibit M-#2.

[*Exhibits M-#1 and M-#2 (Defendant's) in evidence*]

Q. Both of these documents consist of two pages, one containing —

THE COURT: These are copies of the originals?

MR. SILVERMAN: Yes, your Honor.

Q. — and the back of the actual search warrant contains the officer's return showing the items found in the vehicle?

A. Right.

Q. And those are the items that form the basis for the charges pending against the defendant?

A. Yes.

[Court is reading.]

THE COURT: All right.

Q. Going back to the barracks and the defendant, yourself, and the State Trooper, you said the defendant was advised of his rights under the breathalyzer statute. Was a breathalyzer administered?

[14] A. It was.

Q. Do you know the result of the breathalyzer test?

A. It was .13.

Q. And for the record, is it correct that under Massachusetts law anything over .10 raises the presumption one would be under the influence of alcohol?

A. Yes.

Q. Was the breathalyzer administered at about the same time the other events you were describing were taking place?

A. I can't recollect everything that took place last March, but in that same vicinity.

Q. It wasn't several hours later or anything like that?

A. No.

Q. Can you describe the defendant's physical and mental condition, if you can, at the time he was at the State Police barracks?

A. Well, he was — he acted like a person under the influence of alcohol. I mean he was under the weather, he staggered, his eyes were glassy, and he still had the odor of alcohol on his breath, that is all.

Q. Given the breathalyzer of .13, did you have an opinion whether he was under the influence of anything in addition to alcohol?

A. No, I didn't, I couldn't say, because I am not an [15] expert in that field. I couldn't tell, I only had to go by his senses.

Q. Did you participate in the search of the defendant's car?

A. Yes — I didn't participate, I stood by.

Q. You were present?

A. Yes.

Q. Can you tell us where the drugs or the controlled substances that formed the basis for the charges against the defendant were actually found?

A. In the trunk of his car.

Q. In the rear trunk?

A. Yes, the rear trunk of his car.

Q. I assume the search warrant had been issued at the time the search was conducted, is that correct?

A. Yes.

MR. SILVERMAN: No further questions.

[16] *Cross-Examination by Mr. Finn*

Q. With respect to the sequence, can you tell the Court when it was at the barracks the defendant was searched?

A. It was after we had given the breathalyzer test and everything and preparing to take the precautionary measures of putting him in what we call the lockup.

Q. With reference to the telephone call, was that before or after he made the phone calls?

A. I am pretty sure it was before, I wouldn't swear to it.

Q. Now, after the marijuana cigaret was discovered, was it at that time that the conversation took place regarding whether there was any more?

A. Yes.

Q. So you believe that too was before he was attempting to use the telephone, is that correct?

A. I can't remember for sure, but I would say so, yes.

Q. And based on what you have already testified, it was apparent to you, was it not, that the defendant did reach somebody on the telephone?

A. Yes, he did.

Q. And it appeared from what you heard him say it was an attorney?

[17] A. Yes.

Q. Throughout the evening, judging from your conversation, did it appear the defendant had difficulty in understanding you?

A. No, because if I may, your Honor, speak of one thing, when I made the arrest, if I can —

Q. Tell us about that.

A. He was concerned about the vehicle, and I know the dome light was on in the car where he hit the post and it jarred away the door and it wouldn't close, and I remember him saying, "The battery will run down if you don't get the dome light shut off." I remember him saying that, and he remarked again at the barracks or when we were taking him to the barracks about that situation, so I presumed he was knowledgeable of what was going on to my way of considering.

Q. In the course of the search conducted, was money also found?

A. Yes.

Q. Approximately how much?

A. I would say about $3,000.

Q. Where was that?

A. It was in like a strongbox in the truck of the car.

Q. And again with reference to advising the defendant of his rights, this was done on at least two occasions?

[18] A. Three, I think.

Q. And on all of those occasions he indicated he understood those rights?

A. Yes.

Q. And continued to speak with you?

A. Yes.

THE COURT: You say on three occasions?

THE WITNESS: Well, usually the Trooper will give him his rights and give him backup rights to make sure he understood them. I have noticed that the Trooper will give his rights and then again give the rights to make sure he would understand that he had given him his rights. That is the only reason.

THE COURT: Where and when?

THE WITNESS: At the barracks he gave him his rights when he came in the door, and then —

THE COURT: With you?

THE WITNESS: Yes, when he came in, the Trooper gave him his rights again to assure if I had failed —

THE COURT: You had given him his rights at the scene?

THE WITNESS: Yes, I did.

THE COURT: When was the third occasion?

THE WITNESS: When he gave him his rights to [19] receive the breathalyzer test, the type they give for breathalyzer.

THE COURT: How long was that after the time you arrived at the barracks?

THE WITNESS: I would say probably 20 minutes or so.

THE COURT: Will you repeat for me, as best you can remember, substantially — not word for word — what the Trooper said and his tone of voice and the speed at which he said it.

THE WITNESS: You mean his rights?

THE COURT: Yes.

THE WITNESS: He said, "You have a right to remain silent, you have the right to have a lawyer present, anything you say will be held against you in a court of law,

and you have the right to an attorney and have one present while you are being questioned," and then he went on, "You have a right to refuse a breathalyzer test," and told him why — if he refused the breathalyzer test, what would happen to him, and then he told him, "You also have a right to a blood test by a physician or your own physician if you wish, at your own expense."

THE COURT: Did he tell him if he could not [20] afford an attorney, one would be appointed for him?

THE WITNESS: Yes, sir.

THE COURT: How did the defendant respond?

THE WITNESS: He said yes, he understood, and I know he asked about — he even asked, as I recall — he said, "I will lose my license either way, won't I? If I refuse to take it I will lose the license, and if I take it, I will lose the license."

THE COURT: This was with reference to the breathalyzer?

THE WITNESS: Yes.

THE COURT: All right. Anything further, Mr. Finn?

MR. FINN: Yes, your Honor.

Q. (By Mr. Finn) Was there any conversation that you recall, Chief, on the telephone with respect to bail? Did you hear the defendant speaking about bail on the telephone?

A. There was something that he mentioned. As I say, I was away from them, but he asked somebody about "bail out, because they have got all the money, and I don't have any money on me."

MR. FINN: Thank you, that is all.

[21] THE COURT: Mr. Silverman?

MR. SILVERMAN: Yes, your Honor.

[22] *Redirect-Examination by Mr. Silverman*

Q. I think you said you were of the opinion he appeared to understand his rights?

A. Yes.

Q. And that was the right to have an attorney?

A. Yes.

Q. And it appeared for a period of time the defendant was trying to call someone on the phone, and at least the one contact he made appeared to have been with an attorney?

A. Yes.

Q. He appeared to have turned him down, as far as representation?

A. Right.

Q. He didn't say, "I have hired Attorney so-and-so and he will be here and I will put you on the phone"?

A. The Trooper was there and I can't recall if the Trooper spoke to anyone.

Q. You were led to the conclusion this defendant was trying to make contact with an attorney?

A. Right.

Q. And several calls he made unsuccessfully either by failing or dropping the money or not getting any answer?

A. Right, I think that was the problem.

[23] Q. No doubt in your mind while there he was trying to make contact with an attorney?

A. Right.

MR. SILVERMAN: Thank you.

MR. FINN: Nothing further.

THE COURT: That is all?

MR. SILVERMAN: Yes, sir.

THE COURT: You may step down.

MR. SILVERMAN: My other witness will be a State Trooper. I don't think his testimony would be that much longer than the Chief's.

[24] [Court in at 3:25 p.m. Defendant and all counsel present]

FREDERICK TALIAFERRO, Sworn

Direct Examination by Mr. Silverman

Q. Will you please identify yourself for the record.

A. Trooper Fred Taliaferro, Massachusetts State Police, stationed at Shelburne Falls.

Q. Were you a Trooper with the Massachusetts State Police in March, 1975?

A. Yes.

Q. And in that capacity did you have occasion to investigate an automobile incident in conjunction with the Chief of Police of Ashfield?

A. Yes.

Q. And will you tell the Court what you remember, Trooper, as far as your own investigation was concerned.

A. Specifically —

Q. Were you at the scene where the car was stuck?

A. Yes, I was.

Q. Would you tell us what you observed and what you did at the scene.

A. I observed Chief Zalenski and the subject Charles White, now seated before us in the courtroom. Chief Zalenski advised me the subject was under arrest for operating under the influence of alcohol and requested a breathalyzer test.

[25] Q. Did you make observations of the defendant at the scene?

A. No, I did not.

Q. And the defendant went in the same car to the barracks and you followed in your cruiser?

A. I met them there, I did not follow them. I was in my cruiser, and I met them at the barracks.

Q. Did you have conversation with the defendant?

A. Yes, I did.

Q. Would you tell us what conversation you had with the defendant, what if anything you and he did while you were there.

A. Our conversation consisted of advising the defendant of his rights per Miranda, advising the defendant of his rights to a breathalyzer test, and the right to have another test performed at his convenience.

Q. To the best of your knowledge those are the only rights you advised the defendant of in the course of the evening?

A. No.

Q. Any additional rights or different rights you advised him of other than those you have just outlined?

A. No.

Q. While the defendant was at the State Police barracks [26] in your presence, did he attempt to do anything?

A. Yes, he made several phone calls.

Q. And do you have any knowledge as to whether or not he succeeded in completing any of the phone calls?

A. He completed to my knowledge either one or two. One phone call I distinctly remember him saying to the party at the other end, "The reason I called you was someone recommended that I call you."

Q. And did it appear to you in that particular conversation that the defendant might have been talking to a lawyer?

A. Yes, it did.

Q. And what did you hear him say?

A. He said, "I heard you were very good and that is the reason I called you."

Q. Did the defendant say anything to you to indicate he was not able to retain that lawyer at that time or the lawyer was not interested in his case for some reason?

A. I did catch conversation that one lawyer was not able to defend him or did not want to. He stated the lawyer did not want to defend him.

Q. Did the defendant attempt to use the phone on any other occasions?

A. He attempted several times. He reached a party twice and on other occasions I don't think he was successful [27] in completing the calls.

Q. Was there anything unusual about his efforts to use the telephone?

A. No.

Q. Nothing unusual about his efforts to use the telephone?

A. No, he might have had some difficulty with change, which is fairly normal.

Q. And would you say his behavior while using the telephone was normal?

A. Fairly so, yes.

Q. And at some point did you arrange to have the defendant placed in a cell at State Police barracks?

A. Yes.

Q. What condition was he in at that time?

A. Normal condition.

Q. Did you notice anything unusual about his behavior?

A. Yes, he was scratching quite a bit.

Q. Other than that, did you notice anything unusual about him?

A. No.

Q. Anything unusual about the way he was standing, behaving, or moving about?

A. At which time?

[28] Q. Prior to the time you escorted him or arranged to have him placed in a cell.

A. He was sitting when I arranged to have him placed in a cell. We were finished with all business at hand, that is when I placed him in a cell.

Q. Did you administer a breathalyzer test to the defendant?

A. Yes.

Q. What was the reading?

A. .13.

Q. Do you have an opinion as to whether the defendant was under the influence of anything?

A. Yes, alcohol.

Q. Did he appear to be under the influence of anything in addition to alcohol?

A. His scratching seemed abnormal to me at that time. He was constantly scratching himself all over.

Q. Was he doing anything else to indicate to you — strike that. What was he doing that led you to conclude he was under the influence of alcohol other than the breathalyzer results?

A. The breathalyzer results.

Q. You say that was the main thing?

A. Yes.

[29] Q. And other than that and the scratching, nothing unusual about his behavior?

A. No.

Q. Do you have a clear memory of what happened that night?

A. Not perfectly clear, no.

Q. And do you remember testifying in the District Court at the probable cause hearing in this case?

A. Yes.

Q. And this would have been sometime in May, 1975?

A. Yes.

Q. Would you say your memory at that time was a little fresher than it is now about what happened then?

A. No, I was working the 12-hour shift at that time. We had the school problem in Boston and I was working midnight at that time, and we were going anywhere from two to two and a half weeks without a day off. I could possibly have been extremely tired, which might have affected.

Q. You think your memory is as good now about that incident as it was then?

A. Well, possibly different things might have come to mind now that might not have then. I wouldn't comment whether it was sharper or less sharp.

Q. If I said to you the defendant at the time you were [30] with him at the police barracks was in fact bouncing off the walls, would that seem to be something you remember?

A. He might have stumbled somewhat, yes.

Q. You say he might have stumbled somewhat?

A. Yes.

Q. Do you remember him stumbling?

A. Not clearly, no.

Q. What about his conversation with you? Was it incoherent in any way?

A. No, it was not.

Q. You had no trouble conversing with him?

A. None whatsoever.

Q. At some point did you conduct a search of the defendant?

A. Yes, prior to placing him in the cell.

Q. As a result of that search, did you discover some contraband?

A. Yes, I discovered what I believed to be a marijuana cigaret in his breast pocket.

Q. When was this in relation to the phone calls the defendant made?

A. After.

Q. And did you have conversation with the defendant regarding that particular marijuana cigaret?

[31] A. Yes, I advised him again of his rights as I felt he was in possession of narcotics.

Q. And did you ask him anything about the cigaret?

A. Yes, I did. I asked him if he had any other narcotics on his person or in his vehicle or any place, after advising him of his rights.

Q. What did he say?

A. He said he had some in his car.

Q. Did he say anything else about the marijuana as you can recall?

A. Not that I can recall.

Q. Did he say anything else between the time you advised him of his rights on that occasion and the time he said he had more marijuana in his car?

A. Yes, he said he wanted to name some biggies at some point.

Q. He said he wanted to talk to you and give you some names of some biggies? Did he say anything else that you can recall that had relationship to any of the questions you were asking or his rights or the marijuana?

A. No.

Q. Did you at any time make a determination that the defendant was no longer physically able to make telephone calls and should be placed in a cell?

[32] A. No, I determined he should be placed in a cell because the proceedings at that particular time were through.

Q. Nothing to do with his ability or inability to use the telephone?

A. No, sir.

Q. As a result of your conversation with the defendant and his response to your question as to whether he had more marijuana, did you ever obtain a search warrant?

A. I did.

Q. I show you defendant's Exhibits Nos. M-1 and M-2 and ask if those are in fact the affidavit in support of and the search warrant.

A. Yes.

Q. For the record, would you read aloud the short types portion here that begins "March 28, 1975."

A. "March 28, 1975. On March 28, 1975 I assisted Chief Walter Zalenski, Ashfield P D with a subject under arrest for operating under the influence. I gave the prisoner Charles F. White his Miranda rights. I then searched the prisoner and found (1) one marijuana cigaret in the breast pocket of his T shirt color green. I questioned the prisoner regarding the marijuana cigaret. Charles F. White stated that he had some marijuana in his vehicle which he had been driving at the time of his arrest."

[33] Q. And is that the affidavit you applied for?

A. Yes.

Q. Is that a fair statement of your understanding of the facts at that time?

A. Yes.

MR. SILVERMAN: Your Honor, at this time I have a request. At the probable cause hearing held in District Court in this building there was a tape made of that hearing which is in the Clerk's office at District Court, and

I would like — I don't know what the mechanics would be — would it be possible to have you hear this Trooper's testimony at District Court? I think it has some bearing on the accuracy of his testimony this afternoon. I know it's on a reel on a large machine. It is fairly accessible, because I alerted the Clerk there to the fact and he does have it available. I don't know whether you want to try to get it here or go down there.

THE COURT: We could have the cross-examination now.

MR. FINN: Your Honor, I am not sure.

THE COURT: Do you want to suggest to him what areas would be in conflict?

MR. SILVERMAN: It relates to various portions [34] of the Trooper's testimony, particularly his memory and testimony as to the behavior of the defendant at the State Police barracks. That is the main area.

THE COURT: Are you suggesting there is something inconsistent?

MR. SILVERMAN: Yes, things I think inconsistent and also perhaps because of memory or for some other reason have not been testified to that I think very material.

THE COURT: How big a machine is it?

MR. SILVERMAN: It's a reel-to-reel machine. It's too big for one person to carry, it sits on a table.

MR. MOSELEY: They close at 4 o'clock down there.

MR. SILVERMAN: I don't know what to suggest. I am sorry for the confusion. I suppose it would be better to do it with the Trooper here.

THE COURT: I think without question the Trooper must be here. Is this something the court officers could bring here without a great deal of inconvenience?

[Two court officers leave courtroom.]

THE COURT: Except for that, does that complete the direct examination?

MR. SILVERMAN: Yes, your Honor.

[35] *Cross-Examination by Mr. Finn*

Q. Trooper, after the time you searched the defendant and found the marijuana cigaret, you indicated you advised him of his rights?

A. Yes.

Q. What specifically did you advise him of?

A. I advised him he had the right to remain silent, that anything he said would be and could be used against him in a court of law. I further advised him he had a right to have an attorney present before and during any questioning. If he couldn't afford an attorney, one would be appointed for him. I further advised him if he chose to talk, he might stop at any time. After advising him of these rights I then asked him if he did in fact understand his rights. He stated he did, and I asked if he was willing to talk to me, and he stated he was.

Q. Now, at that time before you asked questions, did you also tell him he was to be charged with possession of marijuana?

A. Yes.

Q. And then you questioned him and he told you there was more marijuana in the car?

A. Yes.

[36] Q. My brother asked you whether or not you recall the defendant bouncing off the walls. You testified that you think he might have stumbled. Do you recall anything else with respect to his manner? Did he wobble walking?

A. During the area of the phone calls there was quite a bit of confusion and movement between the defendant, myself, and other officers involved.

Q. Can you clarify what you mean by "confusion and movement"?

A. He made quite a few trips back and forth from the guard room to the pay phone area which is outside the guard room in the hallway of the barracks.

Q. Did you hear any conversation on the telephone with respect to bail? Did you hear the defendant say anything about bail?

A. I can't recall, other than the fact he did wish to be bailed.

Q. You heard him say that?

A. Yes.

Q. Did you have any difficulty in understanding the defendant?

A. No.

Q. Did he appear to have any difficulty at any time understanding you?

[37] A. No.

MR. FINN: Thank you.

THE COURT: Trooper, at the time — first of all, were he and you at the barracks before he was placed under arrest?

THE WITNESS: He was under arrest the entire time he was there for operating under the influence.

THE COURT: How long before he was placed in a cell?

THE WITNESS: I would say at least an hour, possibly an hour and a half.

THE COURT: Well, up until the time you found the marijuana cigaret?

THE WITNESS: We had to wait 20 minutes for the breathalyzer machine to warm up, then another 10 or 15, maybe 20 minutes in the operation procedure. I would say from 40 to 50 minutes.

THE COURT: What was his condition of sobriety at that time? How would you characterize it?

THE WITNESS: As under the influence of alcohol. I wouldn't say he was absolutely drunk, he was under [38] the influence though.

[Court officers reenter courtroom.]

THE COURT: I am advised the machine is set up all ready to operate in the courtroom downstairs. I think it would be more convenient to adjourn there. [The Court, the witness, the defendant, all counsel, the Clerk, the reporter adjourn to District Court on first floor of same building. Trooper Taliaferro goes to witness stand, Court goes to bench. District Court Clerk is at recording machine. Time 4:05 p.m.]

MR. SILVERMAN: I don't believe the Trooper's testimony is very long. It might be easier rather than jumping around on the tape for the benefit of all of us if he would just start it and let it go.

Dictation from recording in District Court

Q. When did you first see the defendant?

A. I arrived at the scene of a motor vehicle accident on Route 116 in Ashfield and witnessed Chief Zalenski and Charles F. White seated in the yellow corduroy jacket. Chief Zalenski stated the defendant was under arrest for operating under the influence and he was requesting I perform a breathalyzer test so —

Q. (Not audible)

A. No, I did not, I immediately proceeded to the [39] station to get the breathalyzer warmed up in anticipation of the Chief's arrival.

Q. Did you inform the defendant of any rights he might have had?

A. Yes, when the defendant arrived at the barracks I advised him of his rights per Miranda, advised of right to breathalyzer under Chapter 90, Section 24. I further advised of right to a blood test performed by another physi-

cian under 263, 5A, and I also advised the defendant of the penalty for refusing the breath test.

Q. In the course of your duties did you have occasion to search the defendant?

A. Yes, I did, prior to giving the defendant the breathalyzer. The defendant attempted to make several phone calls and we gave him — I gave him the breathalyzer test. Before giving him the test I searched him, said to empty his pockets of money and whatever else he might have had and in his breast pocket was a marijuana cigaret. Upon seeing the cigaret I asked the defendant Charles White what doing with the cigaret and if he had any other.

Q. What was his answer?

A. His answer was, "Yes, I have a lot in my vehicle."

Q. At this time did you know where the vehicle was situated?

[40] A. At this time the vehicle was in the process of being towed from the accident scene to the barracks in Shelburne Falls.

Q. (Inaudible)

A. It most certainly did.

Q. (Inaudible)

A. No, I don't recall the exact time it arrived. It is on record.

Q. Affidavit — search warrant.

A. Yes, I called regarding affidavit for search of the vehicle. He advised he would be available at the court — at which time I went to the court, got an affidavit, signed an affidavit, obtained a search warrant, back to the barracks and in the presence of Chief Zalenski then conducted a search of the vehicle.

Q. What — you found in the car — what they are?

A. In the rear in the trunk of the vehicle situated and scattered throughout the trunk mostly near the bumper end of it I found these two bags of marijuana, plants and marijuana seeds, numerous bags of — this bag containing plastic bags, other paraphernalia, cigaret papers, I also observed a strongbox right here; it was also in the vehicle.

[Colloquy inaudible.]

THE COURT: Skip ahead a little bit.

[41] THE CLERK: How far ahead?

MR. SILVERMAN: Where are you now?

THE CLERK: At 398.

MR. SILVERMAN: Maybe like 415.

A. — this was sent to the lab and marked at the laboratory 4506, was found to contain amphetamines, a class B drug; also the cigaret on the person of Charles White, marked 4504, was examined and found to contain marijuana, a Class D drug.

Q. As a result of this did you —

A. I brought complaint immediately against Charles F. White.

Q. And this morning you seek additional complaint based on the laboratory reports?

A. Yes, I clarified one of these substances as being dextrine.

Q. What was your reason for the charges attempting to distribute?

A. The large amount in his possession plus the paraphernalia, the bags which are used to distribute marijuana.

Q. Thank you. Did you have a conversation with Mr. White regarding the phone calls you say he was trying to make?

A. I accompanied Mr. White [illegible]e phone call.

Q. Did he get hold of an attorney?

[42] A. I did assist in dialing and placing the money. He got hold of an attorney at one time apparently. I

couldn't make out the entire gist of the conversation. Apparently some problems in convincing that attorney to defend him. He did make a statement this attorney was recommended to him by friends of his who had been busted on similar charges.

Q. Was that phone call made at that time after the search of the defendant?

A. I really don't recall; so many attempts, I really don't recall whether this particular one was after, before, or —

Q. Other attempts unsuccessful because Mr. White physically unable to use the phone?

A. In the beginning he was able to some extent. Apparently he tried calling home, tried calling various places. A little later he just was physically — couldn't do anything, he was starting to bounce off the walls. At that point I decided he was through with phone — unable to make them then, I placed in the cell.

Q. — the phone call he had conversation with?

A. I cannot recall.

Q. Was that at the same time?

A. As I placed him in the cell? No, previous to being placed in the cell.

[43] Q. At some point you decided he could not make phone calls?

A. He was proceeding to climb the walls and bounce around and didn't know what he was doing. At this point he was placed in the cell.

Q. Was that after conversation?

A. Definitely after he had conversation with one attorney apparently trying to contact other attorneys.

Q. Can you describe his condition at the time — appeared to be under the influence?

A. Most certainly did appear to be under the influence and some narcotic. His eyes were watery and just —

he didn't have too much control over him. He was scratching all night long and some statements incoherent.

Q. Breathalyzer reading .13?

A. That is correct.

Q. Which is not necessarily enough to make someone bounce off the walls?

A. No, it is not.

Q. Your conclusion he may have been under the influence of something else?

A. I came to that conclusion before the results — the breath test.

Q. Did he appear to have bruises from the accident?

[44] A. No, he didn't.

Q. That is all, thank you.

End of tape recording

MR. SILVERMAN: That is all.

THE COURT: Well, does anybody want to ask any further questions of the Trooper at this time?

Q. (By Mr. Silverman) Any question that was your testimony in the District Court? Was that your voice?

A. No question.

THE COURT: Mr. Finn?

Recross-Examination by Mr. Finn

Q. Trooper, if I remember, the tape would indicate your testimony at that time was you understood you conducted the search before the breathalyzer?

A. As I said before, the sequence of events was kind of confusing. I do remember he was sitting at the table prior to being placed in the cell, so apparently the search did come after the breathalyzer.

Q. Your best memory is it was after the breathalyzer?

A. Yes, because he was seated at the table when he produced the items.

THE COURT: Before or after you placed him in the cell?

[45] THE WITNESS: Before being placed in the cell.

Q. (By Mr. Finn) You say the search was made just prior to placing him the cell?

A. That is correct, he was seated and was talking to us after the phone call. That is when he stated that he had the marijuana in the car and so forth, and, "I want to name some biggies," when I told him he was going to the cell.

Q. I don't recall hearing on that tape any mention there that after you discovered the marijuana cigaret you advised him of his rights again.

A. I might have inadvertently left that out.

Q. You are sure now though that that is in fact what happened?

A. Yes.

Q. After you found the marijuana cigaret you advised him of his rights?

A. Correct.

Q. Why did you do that?

A. Because it was an entirely new ball game. He was under arrest initially for being under the influence of alcohol. The introduction of the marijuana cigaret produced another aspect of it, and I wanted him to be sure although he was under arrest for operating under the influence, he was being further charged with a narcotics violation.

[46] Q. Did all of the efforts with the telephone take place before the breathalyzer test?

A. Again I am not absolutely clear, but I am pretty sure it occurred after.

Q. There was a question asked with respect to whether or not he was able to call, and I believe your answer on the tape was to some extent.

A. He did place several calls.

Q. Was there ever a point he indicated to you he wanted to make further calls and you told him this would not be possible?

A. No.

Q. You never prevented him from making additional calls?

A. No, he made quite a few calls. When being placed in the cell he stated he wanted to name some biggies, he didn't say, "I am not finished making calls."

Q. What did you say in response to that when he said he wanted to name some biggies?

A. I told him I didn't want to talk any further.

Q. Do you recall now having heard that testimony with respect to bouncing off the walls, when that happened?

A. Yes, that happened prior to his being seated at the table and prior to the search and prior to being placed in the [47] cell. The fact he was scratching constantly, I might have overdramatized the bouncing off the walls. He looked like it was driving him up the wall, scratching all over, and he did mention something about that. I don't recall what the statement was in regard to that.

Q. Did you see him walking for some time? Can you describe his walking, if you did?

A. The only walking he did was from the place in from the telephone to the guard room. It wasn't in regard to his walking that he was bouncing off the wall, more a statement of condition.

Q. Did you see him bounce off the wall once or twice?

A. No, I didn't.

Q. You did not see him bounce off the walls?

A. No, it was an expression, it was a statement of condition like, "I wanted to climb the walls," so to speak.

Q. His Honor asked you upstairs about the duration of time and I believe you said from the beginning to end about an hour or an hour and a half. Then I believe he asked from the time I think he got to the station until the time he was placed in the cell, and was your answer then 40 to 50 minutes?

A. That is right.

Q. You mentioned also about taking 20 minutes for the breathalyzer to warm up?

[48] A. Yes.

Q. What took place during that period?

A. He was just mostly seated at a table and held conversation with the desk officer, Chief Zalenski, and myself as to — he stated he was on the way home — just small talk.

Q. No interrogation?

A. No.

Q. The extent of the interrogation involved took place solely after that?

A. After introduction of the marijuana cigaret.

Q. And you simply asked after advising him, "Is there any more?"

A. Yes.

MR. FINN: That is all.

THE COURT: Well, you have given me a memorandum on this.

MR. SILVERMAN: Yes, he wouldn't have anything further to say.

THE COURT: Frankly, I glanced at it. I recognize the case you are referring to, the *Hosey* case, I am very familiar with it.

[49] MR. FINN: If I might be heard in argument, I would like to comment.

MR. SILVERMAN: I gave him the memo this morning, he probably didn't know I would come in with it.

THE COURT: Isn't there a question here of the fruit of the poisonous tree? If you assume for the sake of argument there was a knowing, intelligent waiver of Miranda, and the statement was made, that may rule out the statement made? because I recognize the statement was probably necessary to establish probable cause and get a search warrant. Does that mean the warrant is defective?

MR. SILVERMAN: I would think if the statement was made at that time, the defendant was not waiving his constitutional right to remain silent.

THE COURT: Have you got some law that says so?

MR. SILVERMAN: Well, you raise an interesting question. I don't have it at my fingertips.

THE COURT: Will you get some law?

MR. SILVERMAN: Yes.

THE COURT: Do you know of any, Mr. Finn?

MR. FINN: No, your Honor, I would argue the statement should be valid. I think the *Hosey* case is distinguishable on a large number of grounds. Despite the indication of this man certainly under the influence and apparently having some [50] effect from drugs, both officers testified he indicated that he understood what was going on and was in fact advised of his rights. There was indication further when calling his attorneys there was conversation with respect to bail. So I would say even with respect to that question —

THE COURT: Knowing, intelligent waiver the Commonwealth has the burden of proving beyond a reasonable doubt, as I understand.

MR. FINN: As I recall, the testimony was that not only was the advice given, he was asked if he understood, and I would point further to the fact —

THE COURT: There was similar evidence in *Hosey*.

MR. FINN: In *Hosey*, your Honor, in giving the statement, for example the police said they didn't know where they were going to get a lawyer at that time of night. There was an inducement in the fact of the defendant trying to get to a job. There was testimony the man was seemingly extremely emotional; a statement by an officer says he was not making much sense, determining there was something wrong with him, and they also attempted to get him to sign a waiver, a written waiver, and he indicated he couldn't read or write, and I think the fact they attempted to get him to sign all those tended to show a very different kind of circumstance than applied here, your Honor.

[51] THE COURT: Well, that is a factual issue in the case. I am not making a factual determination at this moment. I would like to hear you on the issue.

MR. FINN: I would also argue as a second prong to the argument on the basis of the search itself, even if the statements were excluded, on the basis of the evidence of the marijuana, I certainly would like the opportunity to make that argument. I take it the motion to suppress refers not only to the statement made, but what was found as a result of the search.

THE COURT: Really two-pronged. How much time do you need to submit a memorandum?

MR. SILVERMAN: Not that much time. I would say tomorrow I could. I am going to be up here, I could bring it up or mail it, whatever your Honor wishes.

THE COURT: I will leave it up to you.

MR. FINN: I would appreciate a couple of days.

THE COURT: By Thursday.

MR. SILVERMAN: Do you want us back?

THE COURT: Not necessarily, unless you wish to come back to argue. Thursday is the holiday; Friday, or better still, if you can get the memorandum filed by Wednesday, then if you wish to argue, let me know and I will arrange for you to argue later.

COMMONWEALTH OF MASSACHUSETTS.

SUPERIOR COURT.

FRANKLIN COUNTY. Nos. 5697-5700.

[Title omitted in printing.]

Defendant's Exhibit No. 1.

AFFIDAVIT IN SUPPORT OF APPLICATION FOR SEARCH WARRANT.

G.L. c. 276, ss. 1 to 7; St. 1964, c. 557 As Amended.

March 28, 1975

I, Frederick D. Taliaferro, being duly sworn, depose and say:

1. I am Trooper Mass. State Police stationed at Shelburne Falls Barracks.

2. I have information based upon: On March 28, 1975 I assisted Chief Walter Zalinski Ashfield PD with a subject under arrest for operating under the influence. I gave the prisoner, Charles F. White his miranda [*sic*] rights. I than [*sic*] searched the prisoner and found (1) one marijuana

cigarette in the breast pocket of his tee shirt colorgreen [*sic*]. I questioned the prisoner regarding the marijuana cigarette. He, Charles F. White, stated that he had some marijuana in his vehicle which he had been driving at the time of his arrest.

3. Based upon the foregoing reliable information — and upon my personal knowledge and belief — and attached affidavits — there is probable cause to believe that the property hereinafter described — or is being concealed, etc. and may be found in the possession of _____ at premises 1969 Chevrolet 2 Dr. Hardtop, Mass registration 2M9926 VIN 136379K39207 at Shelburne Falls State Police Barracks, Massachusetts.

4. The property for which I seek the issuance of a search warrant is the following: Marijuana and any apparatus or paraphenalia [*sic*] used in the conception or preparation of controlled substances and any other controlled substances as described in section 34 of chapter 94C.

Wherefore, I respectfully request that the court issue a warrant and order of seizure, authorizing the search of _____ and directing that if such property or evidence of any part thereof be found that it be seized and brought before the court; together with such other and further relief that the court may deem proper.

FREDERICK D. TALIAFERRO.

Then personally appeared the above named Frederick D. Taliaferro and made oath that the foregoing affidavit by him subscribed is true.

Before me this 28th day of March, 1975

DAMASE L. BEAUDOIN, JR.,
Assistant Clerk of the District Court.

COMMONWEALTH OF MASSACHUSETTS.

SUPERIOR COURT.

FRANKLIN COUNTY. Nos. 5697-5700.

[Title omitted in printing.]

Defendant's Exhibit No. 2.

SEARCH WARRANT.

TO THE SHERIFFS OF OUR SEVERAL COUNTIES, OR THEIR DEPUTIES, ANY STATE POLICE OFFICER, OR ANY CONSTABLE OR POLICE OFFICER OF ANY CITY OR TOWN, WITHIN OUR SAID COMMONWEALTH.

Proof by affidavit having been made this day before Damase L. Beaudoin, Jr. by Frederick D. Taliaferro a State Trooper of Mass. that there is probable cause for believing that certain property is unlawfully possessed or kept or concealed for an unlawful purpose.

We therefore command you in the daytime (or at any time of the day or night) to make an immediate search of a 1969 Chevrolet VIN 136379K392077 2 Door H-Top Mass. Reg. 2M9926 owned by Charles F. White of Buckland Road Ashfield and located at State Police barracks at Shelburne Falls, Mass. for the following property: marijuana and other controlled substances as defined in chapter 94C section 34 and any apparatus or paraphenalia [*sic*] used in the preparation or conception of such controlled substances and if you find any such property or any part thereof to bring it and the persons in whose possession it is found before the District Court of Franklin at Greenfield in said County and

Commonwealth, as soon as it has been served and in any event not later than seven days of issuance thereof. (Officer to make return on reverse side)

Witness, Harvey B. Kramer, Esquire, Acting Justice at Greenfield aforesaid, this 28th day of March in the year of our Lord one thousand nine hundred and seventy-five

DAMASE L. BEAUDOIN, JR.,
Assistant Clerk.

Return of Officer Serving Search Warrant.

I received this search warrant March 28, 1975, and have executed it as follows:

On March 28, 1975, at 8:30 o'clock A.M., I searched the premises described in the warrant.

The following is an inventory of the property taken pursuant to the warrant:

(9) Nine — one hundred ($100.00) Dollar Bills
(93) Ninety three — Ten Dollar Bills
(66) Sixty six — Twenty Dollar Bills
(9) Nine — Five Dollar Bills
(9) Packets (Plastic) of orange circular Tablets
100ea — 5 Bags
10ea — 3 Bags
76ea — 1 Bag (marked 80)
67 — Caps SK-E14 — color Brown end & clear end containing numerous orange & white particles contained in Plastic Bag

(2) Two — small Bags white powder in large Plastic Bag
(1) One — larger Small Bag of White Powder
(1) One — large white plastic bag Marijuana approximately 1 lbs
(1) One — large green plastic bag Marijuana approximately 1 lbs

This inventory was made in the presence of Tpr. Frederick L. Johnston.

I swear that this inventory is a true and detailed account of all the property taken by me on the warrant.

Tpr. FREDERICK D. TALIAFERRO #1396

Subscribed and sworn to before me this 28th day of March, 1975.

DAMASE L. BEAUDOIN, JR.,
Assistant Clerk.

COMMONWEALTH OF MASSACHUSETTS.

SUPERIOR COURT.

FRANKLIN COUNTY. Nos. 5697-5700.

[Title omitted in printing.]

Findings and Rulings in re Motion to Suppress Evidence.

In this case the defendant is charged on four indictments with possession with intent to distribute certain controlled

substances. The defendant has filed a motion to suppress all oral or written statements taken from him at the time of and following his arrest, and all evidence seized from his automobile following his arrest. A pre-trial evidentiary hearing was held on the defendant's motion. On the basis of the evidence presented at that hearing I hereby find the following facts.

On March 28, 1975 at about 2:00 o'clock A.M., Chief of Police Walter D. Zalenski of the police department of the Town of Ashfield was notified that an automobile accident had occurred on Route 116 in that town. He proceeded to the scene and found a car which had gone off the road and over an embankment, hitting several posts. The defendant was behind the wheel of the car, trying to drive it back over the embankment and onto the highway. As Chief Zalenski approached the car, the defendant asked him to help, stating that he thought that with a "push" he could "make it over the embankment."

Chief Zalenski, however, noticed that the defendant appeared to be under the influence of either drugs, alcohol, or both. His eyes appeared glassy, his speach was somewhat slurred, and there was a strong odor of alcohol on his breath. The chief accordingly ordered him from the motor vehicle, read him the Miranda warnings, and placed him under arrest. He told the defendant to follow him to his cruiser, and although the defendant staggered a bit as he did so, he was able to walk up the embankment without assistance. Chief Zalenski then called the Massachusetts State Police for assistance.

Trooper Frederick Taliaferro of the Massachusetts State Police responded to Chief Zalenski's call. When he arrived at the scene, the chief told him that the defendant was under arrest and asked him to give the defendant a breathalyzer test at the State Police Barracks. Both officers then

proceeded to the barracks in their respective cruisers. Chief Zalenski took the defendant with him in his cruiser.

When the two officers and the defendant arrived at the State Police barracks, Trooper Taliaferro read the Miranda warnings to the defendant and advised him of his right to use a telephone. He also informed him, in accordance with G.L. c. 90, § 24(1)(f), that his license to operate a motor vehicle would be suspended for 90 days if he refused to submit to a breathalyzer test. The defendant responded that he "might as well" take the test since, "I'll lose my license either way." He also attempted, however, to use a telephone in an effort to retain the services of a lawyer.

The defendant had some difficulty using the telephone. He dropped coins on the floor several times while attempting to do so. He did succeed in completing two calls, one to an attorney whom he asked to represent, but he was unable to obtain the services he sought. After a period of about 40-50 minutes, the breathalyzer test was administered by Trooper Taliaferro. The test indicated that the percentage, by weight, of alcohol in the defendant's blood was, at that time, thirteen one hundredths.[1]

After the breathalyzer test was completed, Trooper Taliaferro prepared to place the defendant in a cell. Before doing so he searched the defendant's person and found what appeared to be a marijuana cigarette in his shirt pocket. At that time the officer told him that he would also be charged with possession of marijuana, and he again read the Miranda warnings to him. The defendant responded that he saw nothing wrong in the possession of one marijuana cigarette. The officer then asked him if he had any other marijuana on his person or in his car, and the defend-

[1]The results of the test created a statutory presumption that the defendant was under the influence of intoxicating liquor. G.L. c. 90, § 24(1)(e).

ant responded that he had more marijuana in his car. The defendant then stated that he could name some "biggies"[2], but Trooper Taliaferro told him that he did not want him to say anything further.

After the defendant was secured in a cell, Trooper Taliaferro prepared an application for a search warrant and an affidavit in support of that application. The affidavit read, in material part, as follows:

> "On March 28, 1975 I assisted Chief Walter Zalenski [sic] Ashfield PD with a subject under arrest for operating under the influence. I gave the defendant, Charles F. White his miranda rights. [sic]. I than [sic] searched the prisoner and found (1) one marijuana cigarette in the breast pocket of his tee shirt colorgreen [sic]. I questioned the prisoner regarding the marijuana cigarette. He, Charles F. White stated that he had some marijuana in his vehicle which he had been driving at the time of his arrest."

A warrant for a search of the defendant's motor vehicle was issued on the basis of the application and the supporting affidavit. Upon a search of the vehicle a substantial quantity of various controlled substances plus $3,195.00 in cash[3] was discovered in the vehicle's trunk. That property was seized and is, together with the defendant's oral statements to Trooper Taliaferro, the subject of the motion to suppress evidence.

1. I am unable to find that the Commonwealth has met its "heavy burden" of demonstrating that this defendant

[2]The defendant was apparently referring to certain drug dealers whom he was willing to identify in exchange for leniency.

[3]The cash was found in a strong box which was found in the trunk.

had knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel at the time when he supplied Trooper Taliaferro with the incriminating information with regard to the presence of controlled substances in his motor vehicle. In the first place, he had affirmatively demonstrated a desire for the assistance of counsel and had placed at least two telephone calls in an attempt to obtain such assistance. Although his attempts were unsuccessful (not surprising in view of the hour), he at no time indicated that he intended to abandon his efforts or that he had changed his mind with regard to that objective. Furthermore, it is apparent from Trooper Taliaferro's reaction that the officer did not regard the defendant as having waived his right to silence or his right to counsel. When the defendant offered to reveal the identity of certain alleged "biggies," the officer declined to question him further. That declination was made, I believe, in deference to the defendant's constitutional rights. Finally, the defendant was clearly under the influence of intoxicating liquor at the time when he made the inculpatory statement. Trooper Taliaferro described him as "bouncing off the walls," and the breathalyzer reading was sufficiently high to create a statutory presumption of intoxication. The Supreme Judicial Court has made it clear that when a suspect has been brought in on a charge of drunkenness, the police should not proceed with questioning on the basis of a waiver of *Miranda* rights until the suspect is "clearly capable of responding intelligently." (*Commonwealth* v. *Hosey*, 1975 A.S. 2732, ____ N.E. 2d ____). The same rule must apply when the suspect has been brought in on a charge of driving under the influence of either liquor or narcotic drugs. In this case that test had

not been met when the defendant made his inculpatory statements. It follows that those statements must be suppressed as evidence at his trial.

2. A different issue, however, is presented by the motion insofar as it seeks suppression of the narcotic drugs and currency which were discovered in the trunk of the defendant's car. That property was discovered and seized in the course of a search that was authorized by a warrant issued by a duly-authorized magistrate. The affidavit that provided the basis for the issuance of that warrant clearly, I think, established probable cause to believe that the automobile which was the subject of the search contained contraband which was subject to such seizure. The existence of such probable cause, however, unquestionably depended upon the statement of the defendant, quoted in the affidavit, that the car did contain such contraband — and that statement was obtained in violation of the defendant's Miranda rights. The question, I therefore suppose, is whether the results of the search must also be suppressed as "fruits of the poisonous tree." I do not think so.

In the first place, I am aware of no decision, binding upon me, in which it has been held that a statement obtained in violation of a suspect's *Miranda* rights may not be used to establish probable cause for the issuance of an otherwise valid search warrant. The industry of counsel on both sides of this particular issue has been unable to disclose a decision on that precise point. I am, of course, aware of the decision of the Supreme Court of the United States in *Wong Sun* v. *United States*, 371 U.S. 471, but that case involved the reverse of the situation with which I am now faced. In *Wong Sun*, the product of a clearly illegal arrest and search was an inculpatory admission by the defendant. The same was true in the more recent case of *Brown* v.

Illinois, ____ U.S. ____, 45 L. Ed. 2d 416, 95 S. Ct. ____ (June 26, 1975). In this case, a statement by the defendant (obtained in violation of *Miranda*) provided the probable cause for the issuance of an otherwise valid warrant.

The holding of the Supreme Court in *Miranda* (*Miranda* v. *Arizona*, 384 U.S. 434, 86 S. Ct. 1602, 16 L. Ed. 2d 694) did not expressly preclude the use of statements obtained without a knowing, intelligent and voluntary waiver of the prescribed warnings as a basis for probable cause for the issuance of a valid warrant. In that case the court promulgated a set of safeguards to protect the delineated constitutional rights of persons subjected to custodial police interrogation and held that unless law enforcement officers give certain specified warnings before questioning a person in custody, and follow certain specified procedures during the course of any subsequent interrogation, any statement made by the person in custody cannot over his objection be admitted in evidence against him *as a defendant at trial*, even though the statement may in fact be wholly voluntary. *Michigan* v. *Mosely*, ____ U.S. ____, 96 S. Ct. 321 (December 9, 1975). The court did not discuss the possibility that such statements could not be used for other purposes. I do not, however, regard that distinction as controlling. The basic purpose of the *Miranda* holding is to protect the individual's Fifth Amendment privilege against compelled testimonial self-incrimination unless the privilege is "knowingly and intelligently" waived, in recognition of the fact that custody creates an inherent compulsion on an individual to incriminate himself in response to questions. A statement which provides probable cause for a subsequent search of a suspect's home or motor vehicle is, when the search results in the discovery and seizure of incriminating evidence, a self-incriminating statement in any real sense. I assume that there might be cases in which

the interests of the integrity of the judicial process would require suppression, not only of the statement, but also of the fruits of the subsequent search. I do not believe, however, that this is such a case.

The exclusionary rule that precludes the admission in evidence of illegally obtained evidence is designed to deter police from violating the constitutional rights of persons suspected of crime. Thus, an involuntary statement coerced from a defendant may not be used as evidence against him, no matter how accurate the contents of the statement may prove to be. The *Miranda* holding extends that principle to exclude even voluntary statements of a suspect in custody, unless that suspect has been given the specified warnings and has waived his right to silence and to the assistance of counsel. I do not believe, however, that the prophylactic approach of *Miranda* must or should be extended to exclude evidence obtained as an indirect result of a suspect's in-custody statement, where there has been no purposeful attempt to subvert the defendant's rights. Compare *Brown* v. *Illinois, supra*.

The Supreme Court of the United States has stated in *Nardone* v. *United States*, 308 U.S. 338, 84 L. Ed. 307, 60 S. Ct. 266:

> "We need not hold that all evidence is 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is 'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.'"

That language was recently quoted with approval in *Brown* v. *Illinois, supra*.

The court has also said,

> "Despite its broad deterrent purpose, the exclusionary rule has never been interpreted to proscribe the use of illegally seized evidence in all proceedings." *United States* v. *Callandra*, 414 U.S. 338, 348.

And, more to the point in my opinion:

> "The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in wilful, or at the very least negligent conduct which has deprived the defendant of his rights. Where the officer's conduct was pursued in complete good faith, however, the deterrence rationale loses much of its force." *Michigan* v. *Tucker*, 417 U.S. 433, 447.

In this case the arresting officers were scrupulous in their efforts to obey the mandate of *Miranda*. The defendant's rights were read to him on no less than three occasions, and the officers made no attempt whatever to interrogate him with regard to the crime for which he was initially arrested. The only interrogation of the defendant consisted of a single question which was put to him after the marijuana cigarette was discovered in his shirt pocket, and after he had been read the warnings for the third time. Furthermore, that question was in response to an unsolicited statement by the defendant to the effect that he did not regard possession of the single cigarette as a crime. It is noteworthy, I think, that Trooper Taliaferro refused to extend the conversation,

although the defendant offered to volunteer further information which might well have led to further self-incrimination. I am satisfied that Trooper Talliaferro asked the single question as a natural consequence of the immediately preceding events, and without any conscious intent to deny the defendant his right to silence or his right to the assistance of counsel.

Although I am unable to find that the defendant had "knowingly and intelligently" waived his right to silence or to the assistance of counsel when he stated that more marijuana could be found in his vehicle, it is clear that no actual coercion, other than that inherent in his in-custody status, was applied by the police to obtain that information. As noted above, the information was given in response to a single question and in the course of a short conversation initiated by the defendant himself. Under these circumstances, I do not believe that exclusion of the evidence seized from the defendant's vehicle would serve as a deterrent to future police misconduct, for there was no conscious police misconduct in this case. Exclusion of this evidence could only serve to defeat the ends of justice with no corresponding benefit to the integrity of our judicial system. I do not believe that *Miranda* should or will be stretched that far.

Accordingly, it is ordered

(1) That the motion to suppress evidence, insofar as it related to any oral statements made by the defendant while in custody, is allowed.

(2) That the motion to suppress evidence insofar as it relates to the property seized from the defendant's motor vehicle in the execution of the search warrant, is denied.

JOHN F. MORIARTY,
Justice of the Superior Court.

Entered: January 29, 1976.

COMMONWEALTH OF MASSACHUSETTS.

SUPERIOR COURT.

FRANKLIN COUNTY. Nos. 5697-5700.

[Title omitted in printing.]

Defendant's Exception.

Now comes the defendant, CHARLES F. WHITE, and claims an exception to the "FINDINGS AND RULINGS IN RE MOTION TO SUPPRESS EVIDENCE" entered by the Court on January 29, 1976.

DEFENDANT,
By STEPHEN W. SILVERMAN.

Filed February 4, 1976.

COMMONWEALTH OF MASSACHUSETTS.

SUPERIOR COURT.

FRANKLIN COUNTY. Nos. 5697-5700.

[Title omitted in printing.]

Defendant's Claim of Appeal.

Now comes the defendant, CHARLES F. WHITE, and pursuant to Mass. General Laws, Chapter 278, Section 33B,

being aggrieved by the opinions, rulings, directions and judgment of the Superior Court rendered upon questions of law arising out of the above-captioned cases, claims an appeal.

CHARLES F. WHITE, DEFENDANT,
By STEPHEN W. SILVERMAN.

Filed June 9, 1976.

COMMONWEALTH OF MASSACHUSETTS.

SUPERIOR COURT.

FRANKLIN COUNTY. Nos. 5697-5700.

[Title omitted in printing.]

Defendant's Assignment of Error.

Now comes the defendant and makes the following assignment of error:

1. The Superior Court judge erred in denying in part the defendant's "Motion to Suppress Evidence". The evidence was obtained as a result of violations of the defendant's rights under the Fourth, Fifth and Sixth Amendments to the Constitution of the United States and should have

been suppressed as "fruits of the poisonous tree". Exception filed on February 4, 1976 (Docket #7)

Respectfully submitted,
By his attorney,
ROBERT S. COHEN.

Filed November 26, 1976.

COMMONWEALTH OF MASSACHUSETTS.

SUPREME JUDICIAL COURT

FOR THE COMMONWEALTH.

COMMONWEALTH *vs.* CHARLES F. WHITE.

Franklin. May 5, 1977. — December 30, 1977.

Present: HENNESSEY, C.J., QUIRICO, BRAUCHER, KAPLAN, & LIACOS, JJ.

Search and Seizure. Probable Cause. Constitutional Law, Search and seizure, Probable cause, Waiver of constitutional rights. *Practice, Criminal,* Suppression of evidence. *Waiver.*

INDICTMENTS found and returned in the Superior Court on September 9, 1975.

A pre-trial motion to suppress evidence was heard by *Moriarty*, J., and the cases were heard by *Cross*, J.

After review was sought in the Appeals Court, the Supreme Judicial Court, on its own initiative, ordered direct appellate review.

Robert S. Cohen for the defendant.

John M. Finn, Assistant District Attorney (*Stephen R. Kaplan*, Assistant District Attorney, with him) for the Commonwealth.

LIACOS, J. In a jury waived trial held pursuant to the provisions of G. L. c. 278, §§ 33A-33G, the defendant was found guilty on four indictments charging him with unlawful possession with intent to distribute controlled substances, namely, marihuana (Class D); cocaine (Class B); amphetamines (Class B); and LSD (Class C). G. L. c. 94C, § 31. He was sentenced to not more than seven nor less than five years at the Massachusetts Correctional Institution at Walpole as to three of the convictions, the sentences to run concurrently. The marihuana conviction was filed. The defendant appealed to the Appeals Court and we transferred the case here on our motion. We reverse the convictions.

The only point we need consider on this appeal is whether the trial judge was correct in denying the defendant's motion

to suppress evidence of controlled substances, related paraphernalia, and the contents of a strongbox ($3,195) found in a search of the trunk of the defendant's car. The search was pursuant to a search warrant, the affidavit in support of which was based on statements which the judge held should be suppressed as they were obtained in violation of the commands of *Miranda* v. *Arizona*, 384 U.S. 436 (1966). The underlying facts found after a hearing on the defendant's motion are set forth in the judge's findings and rulings on the matter. We state the facts, as embodied therein, necessary for our decision.

At approximately 2 A.M., on March 28, 1975, the chief of police of the town of Ashfield responded to a report of a motor vehicle accident. The defendant's automobile had apparently gone off the road over an embankment, hitting several posts. The chief of police found the defendant in his vehicle alone trying to get his car back on the road. The defendant's behavior and appearance gave the chief reason to believe that the defendant was operating under the influence of drugs or alcohol, or both, whereupon he ordered the defendant out of the car, placed him under arrest for operating under the influence, and gave him the warnings required by *Miranda* v. *Arizona*, *supra*. At this point, he ordered the defendant to walk up to the police cruiser, a task the defendant accomplished without assistance, but with some degree of staggering.

Responding to a call for assistance from the chief of police, an officer of the State police met him at the accident scene. After arranging to have the defendant's car towed to the State police barracks at Shelburne Falls, he returned to the barracks. The chief of police had transported the defendant to the same State police barracks for the purpose of having a breathalyzer test administered to the defendant. When the trooper arrived at the barracks, he read the defendant his

Miranda rights. He advised the defendant of his right to a breathalyzer test and of the consequences of his refusal to submit to the same, G. L. c. 90, § 24 (1) (*f*), of his right to a blood test by a physician of his own choice, and of his right to make a telephone call. The defendant agreed to submit to the breathalyzer test.

Prior to the administration of the test, the defendant attempted to retain the services of an attorney through the use of a coin operated telephone. In the course of the attempts to reach an attorney the defendant experienced some difficulty, dropping coins on the floor several times. There was evidence from the trooper that the defendant "bounce[d] around," "climb[ed] the walls," was scratching himself in an unusual way, and "didn't know what he was doing." After these attempts to reach an attorney were unsuccessful, the defendant took the test, the results of which were sufficient to invoke the statutory presumption that the defendant was driving under the influence of intoxicating liquor. G. L. c. 90, § 24 (l) (*e*).

At this point, the trooper prepared to place the defendant in a holding cell. Before doing so, the trooper searched the defendant's person and discovered what appeared to be a marihuana cigarette in the defendant's shirt pocket. The trooper then informed the defendant that he would also be charged with possession of marihuana. He gave the defendant his Miranda warnings once more. The defendant responded that he saw nothing wrong with the possession of one marihuana cigarette. The trooper then asked the defendant if he had any other marihuana on his person or in his car, and the defendant replied that he had some marihuana in his car. The defendant also stated that he could name some "biggies," to which the trooper replied that he did not wish to inquire any further.

Armed with the information gained from the defendant's statements, the trooper prepared an application for a search

warrant to search the defendant's vehicle, by then located at the State police barracks. The affidavit stated in material part: "On March 28, 1975 I assisted Chief Walter Zalenski [*sic*] Ashfield PD with a subject under arrest for operating under the influence. I gave the prisoner, Charles F. White his miranda [*sic*] rights. I than [*sic*] searched the prisoner and found (1) one marijuana cigarette in the breast pocket of his tee shirt colorgreen [*sic*]. I questioned the prisoner regarding the marijuana cigarette. He, Charles F. White, stated that he had some marijuana in his vehicle which he had been driving at the time of his arrest."

A warrant was issued on the basis of the affidavit. A search of the trunk of the vehicle pursuant thereto resulted in the discovery of a substantial quantity of controlled substances, related paraphernalia, such as glassine bags and cigarette wrappers and a strongbox containing a substantial amount of cash. It was this property as well as the defendant's statements that was the subject of the defendant's suppression motion.

The judge concluded that the defendant's statements must be suppressed as the Commonwealth had not met its heavy burden of demonstrating that the defendant had knowingly or intelligently waived his right to counsel or his privilege against self-incrimination. Relying primarily on *Commonwealth* v. *Hosey*, 368 Mass. (1975) [Mass. Adv. Sh. (1975) 2732], he reasoned that the defendant's condition precluded him from making an effective waiver. Despite this ruling, however, he declined to order the suppression of the physical objects, including the controlled substances seized in the defendant's car. The judge reasoned that the defendant's statements could be used in support of the application for the search warrant since he did not believe the policies behind the exclusionary rule would be furthered by its application in this context. He found that the officers were scrupulous in observing the de-

fendant's rights and that the statement as to the location of the controlled substances in the vehicle did not come about as a result of police subterfuge or any purposeful attempt to subvert the defendant's rights.

The essence of the defendant's arguments here may be summarized as follows: (a) the judge correctly ordered the suppression of the defendant's inculpatory statements; (b) the judge correctly ruled that without the defendant's statements the application for the warrant failed to establish probable cause; and (c) since the warrant was invalid, the search of the car was illegal and the objects seized therein should have been suppressed. The Commonwealth's answer to these claims is that (a) the judge was wrong in ordering suppression of the defendant's statements; (b) the affidavit in support of the search warrant, even without such statements, demonstrates probable cause (contrary to the judge's ruling); and (c) if the warrant is ruled invalid, the search is still valid as a warrantless car search or, alternatively, as an inventory search of an impounded vehicle. We turn first to the threshold issue of the propriety of the suppression of the defendant's statements, and the effect thereof.

1. The Commonwealth appears to urge that we reexamine the factual determination of the judge relative to the suppression of the defendant's statements. The claim is that the judge erroneously found that the defendant did not intelligently and voluntarily waive his rights under *Miranda*. It has sought to distinguish *Commonwealth* v. *Hosey*, *supra*, relied on by the judge below, in numerous ways and point to our recent decision in *Commonwealth* v. *Fielding*, Mass. (1976) [Mass. Adv. Sh. (1976) 2290], as limiting the *Hosey* case to extreme circumstances of loss of cognitive ability.

It is well established that "'courts indulge every reasonable presumption against waiver' of fundamental constitutional rights," *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938), quoting

from *Aetna Ins. Co.* v. *Kennedy*, 301 U.S. 389, 393 (1937). Thus, when inculpatory statements are made by a defendant in a situation like that presented in the instant case, "a heavy burden rests on the [prosecution] to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel." *Miranda*, *supra* at 475. *Commonwealth* v. *Cain*, 361 Mass. 224, 228 (1972).

The Commonwealth's argument founders on the well established principle of appellate review that where, as here, subsidiary findings of fact have been made by a trial judge, they will be accepted by this court absent clear error. *Commonwealth* v. *Hosey*, *supra*. See *Commonwealth* v. *Murphy*, 362 Mass. 542 (1972). Such findings as to intelligent and voluntary waiver, or the absence thereof, are entitled to substantial deference by this court. *Commonwealth* v. *Roy*, 2 Mass. App. Ct. 14, 19 (1974). Having heard the evidence, the judge specifically found that the defendant had "affirmatively demonstrated a desire for the assistance of counsel" and had "at no time indicated . . . he had changed his mind" in that regard. The judge also found that the State trooper did not regard the defendant as having waived his right to silence or his right to counsel. On those facts alone it would be a difficult task for the Commonwealth to establish that the defendant had waived his right to counsel. *Brewer* v. *Williams*, 430 U.S. 387 (1977). If one considers, as did the judge, the evidence of the defendant's being under the influence, established through the breathalyzer test, and his behavior, it is clear that the more prudent and constitutionally preferable course would have been for the police to withhold any further questioning "until [the defendant] was clearly capable of responding intelligently." *Commonwealth* v. *Hosey*, *supra* at [Mass. Adv. Sh. (1975) at 2743]. While the case before us is not so compelling as was the situation in *Hosey*, we cannot

conclude that the judge erred in finding that the Commonwealth's heavy burden had not been satisfied.

2. It follows that we must then consider whether such statements, despite their inadmissability at trial, could be used for the purpose of establishing probable cause sufficient to obtain a valid search warrant. Unlike the trial judge, we conclude that they may not.

In *Commonwealth* v. *Hall*, 366 Mass. 790, 795 (1975), we recognized that evidence obtained in violation of constitutional guaranties against illegal search and seizure may not be considered in determining whether there was probable cause to obtain a warrant. More recently, in *Commonwealth* v. *Haas*, Mass. (1977) [Mass. Adv. Sh. (1977) 2212], we held that evidence obtained in violation of the principles laid down in *Miranda* v. *Arizona*, *supra*, may not be considered in determining whether there is probable cause to make an arrest and thus validate a search made incident to the arrest.

From these cases it follows that neither may such statements be used for the purpose of considering whether there was probable cause to obtain a search warrant. To hold otherwise would, in effect, sanction the initial violations of constitutional guaranties which the judge found took place in the police barracks. The need to prevent such violations from escaping review underlies the so called "fruit of the poisonous tree" doctrine set forth in *Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385 (1920), and *Nardone* v. *United States*, 308 U.S. 338 (1939). Although this exact issue has not been determined by the Supreme Court, but cf. *Michigan* v. *Tucker*, 417 U.S. 433 (1974), we believe that *Haas* controls the issue in this Commonwealth. The policies underlying the "fruits" doctrine in the search and seizure area are even more compelling in the instant case. Evidence obtained in violation of the guaranty against unreasonable searches and seizures is more often than not reliable, probative evidence. *Schneckloth* v.

Bustamonte, 412 U.S. 218, 250 (1973) (Powell, J., concurring). While evidence obtained in violation of the Miranda guidelines may be similarly probative and reliable, there is a far more significant danger that it will not be so. *Miranda* v. *Arizona*, *supra* at 447, 455 & n. 24.

3. The judge ruled that the existence of probable cause to support the search warrant "unquestionably depended upon the statement of the defendant, quoted in the affidavit, that the car did contain such contraband." We agree. It does not appear that the warrant, considered without the tainted evidence, is sufficient to establish probable cause. Cf. *Commonwealth* v. *Hall*, *supra*. Without the defendant's admission, the only evidence for the magistrate to consider was the allegation that the defendant was under arrest for driving under the influence and the marihuana cigarette was that found in his shirt pocket.

The lowest threshold of probable cause which we have previously accepted in a case of this kind was in *Commonwealth* v. *Miller*, 366 Mass. 387 (1974). In that case the facts were that the defendant was found with a small quantity of marihuana and uttered words which arguably indicated a consciousness of criminal conduct. A majority of the court found these facts sufficient to establish probable cause over the dissent of three Justices. In this case even less is present. Neither the possession of the small quantity of marihuana nor the fact that the defendant was thought to be operating under the influence of alcohol sufficiently establishes a nexus between the criminal activity sought to be investigated and the trunk of the vehicle. There is no necessary correlation between the untainted allegations in the affidavit and the presence of controlled substances in the defendant's car. At best, issuance of a warrant on such information alone would be a "hunch" on the part of the issuing magistrate, *Commonwealth* v. *Miller*, *supra* (Hennessey, J., dissenting), a level of

information not on a par with that required by the Constitution. This much was recognized by the judge and we see no reason to disagree.

4. This does not end our inquiry however. We indicated in *Commonwealth* v. *Blackburn*, 354 Mass. 200, 203 (1968), that a police officer should not be penalized for obtaining a search warrant, later ruled invalid, when there were adequate grounds to conduct a warrantless search. See *United States* v. *Darrow*, 499 F.2d 64, 68 (7th Cir. 1974). We consider whether the search here could be vindicated as a valid warrantless search.

In this case, no evidence was presented at the hearing on the motion which would justify this court in upholding the search as an inventory search, *South Dakota* v. *Opperman*, 428 U.S. 364 (1976);[1] *Cady* v. *Dombrowski*, 413 U.S. 433 (1973) (evidence of regular practice) or as the automobile equivalent of a "stop and frisk" search, *Commonwealth* v. *Almeida*, Mass. (1977) [Mass. Adv. Sh. (1977) 1799]. Nor can it be justified as a search incident to arrest. See *Chimel* v. *California*, 395 U.S. 752 (1969). Thus the search, if it is to be sustained at all, must be upheld as a permissible warrantless search of an automobile made on the basis of probable cause.

While the law concerning the proper parameters of warrantless automobile searches continues to be an area of vexing inconsistency and illogic, see *Commonwealth* v. *Haefeli*, 361 Mass. 271, 278 (1972), we have adhered to the view expressed in *Chambers* v. *Maroney*, 399 U.S. 42, 52 (1970), that "[f]or constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant. Given probable

[1] We intimate no opinion as to whether we would choose to follow the rule in *Opperman*, since it is not applicable to the facts here. See *State* v. *Opperman*, S.D. (1976) (247 N.W.2d 673 [1976]).

cause to search, either course is reasonable under the Fourth Amendment." See *Commonwealth* v. *Miller*, *supra* (Hennessey, J., dissenting). *Chambers* also allows such searches based on probable cause to be conducted at the station house as opposed to requiring that they be made at the scene where the police initially encounter the motor vehicle. However, we have understood *Chambers* read in conjunction with *Coolidge* v. *New Hampshire*, 403 U.S. 443 (1971), to require that the determination as to probable cause must be made at the time the automobile is first stopped, rather than on facts as may become available at a later time. *Commonwealth* v. *Rand*, 363 Mass. 554, 559 (1973). In this case, the facts available at the time of the first encounter would allow the officer to conclude that the defendant was driving under the influence of alcohol. Anything else was found at a point in time beyond that which we may permissibly consider under *Chambers* and *Coolidge*. *Commonwealth* v. *Rand*, *supra*. See, *United States* v. *Edwards*, 415 U.S. 800 (1974).

We do not believe that the mere fact that a person is apprehended for driving under the influence of an intoxicant is, without more, sufficient to allow a prudent man to conclude that a crime requiring a search of the automobile, its trunk, and the interior of a strongbox located therein has been committed. *Commonwealth* v. *Miller*, *supra* (Hennessey, J., dissenting). Cf. *United States* v. *Ragsdale*, 470 F.2d 24 (5th Cir. 1972). See *United States* v. *Chadwick*, U.S. (1977) [97 S. Ct. 2476 (1977). It therefore follows that a warrantless search cannot be considered permissible in these circumstances and that the judgments of the court below must be reversed.

Judgments reversed.
Findings set aside.

In the Supreme Court of the United States.

OCTOBER TERM, 1977.

No. 77-1388.

COMMONWEALTH OF MASSACHUSETTS,
PETITIONER,

v.

CHARLES F. WHITE,
RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS.

Brief for Respondent in Opposition.

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BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS.

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CONSTITUTIONAL AND STATUTORY PROVISIONS.

In the Supreme Court of the United States.

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Brief for Respondent in Opposition.

Opinion Below.

The opinion of the court below (Pet. App. A, pp. 1a-10a) is reported at Mass. Adv. Sh. (1977) 2805.

Jurisdiction.

The decision of the court below was entered on December 30, 1977. The jurisdiction of this Court has been invoked pursuant to 28 U.S.C. § 1257(3). The respondent respectfully suggests that the "judgment" of the court below is an inadequate basis for jurisdiction under 28 U.S.C. § 1257(3) because the judgment lacks finality.

Questions Presented.

1. Whether the decision of the Supreme Judicial Court of Massachusetts reversing a judgment of guilty and setting aside findings of a trial judge who denied in part a motion to suppress evidence in a criminal case is a final order under 28 U.S.C. § 1257(3).

2. Whether statements held inadmissible at trial because there was no intelligent waiver of *Miranda* v. *Arizona* safeguards may be used to establish probable cause for the issuance of a search warrant.

Constitutional Provisions Involved.

Fourth Amendment.

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Fifth Amendment.

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Fourteenth Amendment.

Section 1. ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . .."

Statement of the Case.

The petitioner's statement of the case describing the proceedings below adequately sets forth the chronology of the state court proceedings.

Statement of the Facts.

The facts of this case are stated fully in the "Findings and Rulings in re Motion to Suppress Evidence" of the Massachusetts Superior Court trial judge (Petitioner's Appendix [Pet. App.] B, pp. 11a-19a) and the decision of the Massachusetts Supreme Judicial Court (Pet. App. A, pp. 1a-10a) and are adequately summarized in the Commonwealth's petition at pages 3-6.

Reasons for Denying the Writ.

I. THE DECISION OF THE SUPREME JUDICIAL COURT OF MASSACHUSETTS LACKS FINALITY AND IS NOT A FINAL JUDGMENT UNDER 28 U.S.C. § 1257(3).

It is settled that the Supreme Court of the United States has appellate jurisdiction of state litigation "only after the highest state court in which judgment could be had has rendered a '[f]inal judgment or decree.'" *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 476-477 (1975).

Respondent contends that since he is subject to further proceedings in Massachusetts, including a new trial, the Supreme Judicial Court's decision is not "final."

It is submitted that the denial of the motion to dismiss for lack of finality in *California* v. *Stewart*, 384 U.S. 436, 498 n. 71 (1966), did not create an unvarying rule that all decisions of a state's highest court concerning a motion to suppress evidence are final for purposes of jurisdiction under 28 U.S.C. § 1257(3). See, *e.g.*, *Cohen* v. *New York*, 385 U.S. 976 (1966).

Further, respondent contends that this Court's limitation in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 547 (1949), that "we do not mean that every order fixing security is subject to appeal[; h]ere it is the right to security that presents *a serious and unsettled question*," (emphasis supplied) is applicable to the case at bar.

Moreover, the allowance of the writ of certiorari in the instant case would be contrary to the doctrine that this Court should decide constitutional questions only when necessary (see, *e.g.*, *Republic Natural Gas Co.* v. *Oklahoma*, 334 U.S. 62, 71 (1948)), and could, by encouraging interlocutory appeals, result in overcrowding of this Court's docket.

II. THE SUPREME JUDICIAL COURT OF MASSACHUSETTS WAS PLAINLY CORRECT IN HOLDING THAT STATEMENTS OBTAINED WITHOUT A VALID WAIVER IN VIOLATION OF MIRANDA V. ARIZONA, 384 U.S. 436 (1966), MAY NOT BE USED TO ESTABLISH PROBABLE CAUSE TO OBTAIN A VALID SEARCH WARRANT.

Respondent contends that the theories underlying *Miranda* v. *Arizona*, 384 U.S. 436 (1966), and *Wong Sun* v. *United States*, 371 U.S. 471 (1963), compel the conclusion that the unanimous decision of the Supreme Judicial Court was correct.

In *Miranda* v. *Arizona*, *supra*, this Court declared that until the required warnings and waiver are demonstrated at trial, no evidence obtained as a result of interrogation can be used against a defendant in a criminal trial. *Miranda*, *supra*, at 479.

In *Wong Sun* v. *United States*, *supra*, this Court stated that the test of the "fruit of the poisonous tree" doctrine was "whether, granting establishment of the primary il-

legality, the evidence . . . has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." *Wong Sun*, *supra*, at 488.

Additionally, this Court has stated that the *Wong Sun* rationale could be applied to Fifth Amendment violations. *Michigan* v. *Tucker*, 417 U.S. 433, 446-447 (1974).

This Court carved out exceptions to *Miranda* in *Harris* v. *New York*, 401 U.S. 222 (1971), and *Michigan* v. *Tucker*, 417 U.S. 433 (1974). In *Harris*, this Court held that statements of an accused taken without informing him of his right to counsel could be used for impeachment purposes at trial. In *Tucker*, the defendant had given a statement which was excluded because of improper *Miranda* warnings. This Court held, however, that the testimony of a witness whom the police discovered as a result of the defendant's statement was admissible.

Respondent contends that *Tucker* does not control the case at bar. Unlike the instant case, in *Tucker* the defendant did not accuse himself, *Michigan* v. *Tucker*, *supra*, at 449, and the police misconduct occurred prior to the decision in *Miranda*. *Tucker*, *supra*, at 447.

Moreover, it is submitted that, unlike the case at bar, in both *Harris* and *Tucker* the police misconduct violated only the prophylactic rules developed by *Miranda*. See *Michigan* v. *Tucker*, *supra*, at 446.

As the Maryland Court of Special Appeals has stated in applying *Wong Sun* v. *United States*, *supra*, to situations involving Fifth Amendment violations:

> "In the instant case, we do not have official action pursued in complete good faith, with the confession rendered inadmissible by the mere inadvertent omission of one of the prophylactic *Miranda* warnings. We have the confession being obtained in the absence of an effective waiver of the constitutional rights relating to self-incrimination and assistance of counsel to which appellant was entitled. The rationale of the holdings in *Harris* and *Tucker* does not apply to make admissible the tangible evidence obtained here, any more than it would apply to make admissible evidence derived from a confession not voluntary in the traditional sense." *In re Appeal No. 245 (75) from Cir. Ct. for Kent County*, 29 Md. App. 131, 349 A. 2d 434, 445 (1975).

Similarly, the respondent's statement in the case at bar was not the result of an inadvertent omission of the prophylactic *Miranda* warnings. It was the result of the willful questioning of the respondent, who "had affirmatively demonstrated a desire for the assistance of counsel and had placed at least two telephone calls in an attempt to obtain such assistance" (Pet. App. B, p. 14a); had been "bouncing off the walls" (Pet. App. B, p. 14a); and was statutorily presumed to be intoxicated (Pet. App. B, p. 14a). This is a case where an admission was obtained by intentional questioning without a valid waiver.

It is submitted that, if the police are allowed to use illegally obtained confessions and admissions for clues rather than being required to amass evidence independently, then the warning requirements of *Miranda* would be meaningless, for the police would be permitted to accomplish indirectly what they could not achieve directly.

This Court, in *Miranda*, discussing the privilege against self-incrimination, stated that:

". . . [T]he constitutional foundation underlying the privilege is the respect a government — state or federal — must accord to the dignity and integrity of its citizens. To maintain a 'fair state-individual balance,' to require the government 'to shoulder the entire load,' 8 Wigmore, Evidence 317 (McNaughton rev. 1961), to respect the inviolability of the human personality, our accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth." *Miranda* v. *Arizona, supra,* 384 U.S. at 460.

Respondent submits that the unanimous decision of the Supreme Judicial Court of Massachusetts is correct in that it refuses to "sanction the initial violations of constitutional guaranties which . . . took place in the police barracks," *Commonwealth* v. *White,* Mass. Adv. Sh. (1977), 2805, 2812 (Pet. App. A, p. 7a), and upholds the "privilege against self-incrimination — the essential mainstay of our adversary system." *Miranda* v. *Arizona, supra,* at 460.

Conclusion.

For reasons stated above, the petition for writ of certiorari should be denied.

Respectfully submitted,

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In the
Supreme Court of the United States.

OCTOBER TERM, 1977.

No. 77-1388.

COMMONWEALTH OF MASSACHUSETTS,
PETITIONER,

v.

CHARLES F. WHITE,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS.

Brief of the Petitioner.

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Brief of the Petitioner.

Opinions Below.

The opinion of the Supreme Judicial Court for the Commonwealth of Massachusetts is reported at Mass. Adv. Sh. (1977) 2805; 371 N.E. 2d 777 (1977) (A. 72).

Jurisdiction.

The judgment of the court below was entered on December 30, 1977. The petition for writ of certiorari was filed on March 30, 1978, and was granted on May 30, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

Question Presented.

Whether statements held inadmissible at trial because the prosecution did not demonstrate a knowing and intelligent waiver under *Miranda* v. *Arizona*, 384 U.S. 436 (1966), must be automatically suppressed for all purposes?

Constitutional Provision Invoked.

FIFTH AMENDMENT.

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Statement of the Case.

PRIOR PROCEEDINGS.

On May 20, 1976, Charles F. White, after a jury-waived trial, was found guilty (A. 2, 5, 8, 11) on four indictments charging him with unlawful possession with intent to distribute controlled substances, namely, marihuana, cocaine, amphetamines, and L.S.D. (A. 14-17), in violation of Mass. Gen. Laws c. 94C, § 31.

Prior to trial, the respondent filed a motion to suppress all oral or written statements taken from him following his arrest and all evidence seized from his automobile pursuant to a search warrant (A. 18).

After a pre-trial hearing on the motion to suppress (A. 22-54), a judge of the Superior Court of the Commonwealth issued *Findings and Rulings* (A. 59-68). The court concluded that the statement must be suppressed at trial because the Commonwealth had failed to demonstrate that the respondent had knowingly and intelligently waived his *Miranda* rights (A. 62-63), but held that the statement could be used to form the basis for a finding of probable cause for issuance of a search warrant and, therefore, the drugs and currency seized from the respondent's automobile, pursuant to that search warrant, were admissible (A. 68). The respondent filed an exception to the *Findings and Rulings* (A. 69).

On appeal, the Supreme Judicial Court reversed, holding that statements obtained in violation of the principles of *Miranda* v. *Arizona*, 384 U.S. 436 (1966), could not be used to support issuance of a search warrant and that evidence obtained pursuant to that warrant must be suppressed. The court sustained the lower court's finding that the Commonwealth had not sustained the heavy burden placed upon it by *Miranda* v. *Arizona*, 384 U.S. 436, 475 (1966), to

demonstrate that the respondent had waived his privilege against self-incrimination and his right to retained or appointed counsel. *Commonwealth* v. *White*, ____ Mass. ____, Mass. Adv. Sh. (1977) 2805 (A. 72).

Statement of Facts.

The facts as elicited at the *Hearing on the Motion to Suppress* (A. 22-54) may be summarized as follows.

On March 28, 1975, at approximately 2 a.m., the chief of police of Ashfield, Massachusetts, was notified that an automobile accident had occurred. He proceeded to the scene and found a car which had gone over an embankment, hitting several poles. The respondent, who was seated in the car (A. 23, 60), asked the chief to help him, stating, "If you give me a push, I think I can make it" (A. 24). The chief, however, thought he (White) was under the influence of something. His eyes appeared glassy; his speech was somewhat slurred; and there was a strong odor of an alcoholic beverage (A. 24, 60). The chief then ordered him from the car, gave him his *Miranda* rights and told the respondent to follow him to his cruiser, which he did without assistance (A. 24, 60). The respondent expressed concern that the battery in his car might run down because the dome light was on (A. 31).

The chief then called the Massachusetts State Police for assistance. Trooper Taliaferro responded and was informed by the chief that the respondent "was under arrest for operating under the influence of alcohol" and a breathalyzer test was requested (A. 35, 60). The chief and the respondent then proceeded to the State Police barracks, followed by the trooper (A. 24-25, 60-61).

On arrival at the barracks, the respondent was again given his *Miranda* warnings, advised of his right to use a telephone and of his rights under Mass. Gen. Laws c. 90, § 24(1)(f) as to a breathalyzer test (A. 25, 32-33, 36, 61). The respondent replied to the effect that he would "lose my license either way" and agreed to take the test (A. 33, 61). He also attempted to call an attorney (A. 26, 31, 34, 36, 61).

There was further testimony that the respondent had some difficulty using the telephone and dropped some money on the floor in the process (A. 26, 37, 61);[1] but that he did succeed in completing two calls, one to an attorney who apparently declined to represent him (A. 26, 61). After approximately 40-50 minutes (A. 44, 61), a breathalyzer test was administered. The reading, .13, indicated that the respondent was under the influence of alcohol (A. 38, 45, 61).[2]

After the breathalyzer test was completed, Trooper Taliaferro prepared to place the respondent in a cell (A. 50, 61). Before doing so he searched the respondent's person and found what appeared to be a marihuana cigarette in his shirt pocket. At that time the trooper told him (White) that he would also be charged with possession of marihuana, and he again read the *Miranda* warnings to him (A. 43, 61). The respondent replied that he saw nothing wrong in the possession of one marihuana cigarette (A. 27, 61). The officer then asked him if he had any other marihuana on his person or in

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[1]During the hearing on the motion to suppress, a tape recording of Trooper Taliaferro's testimony at the prior probable cause hearing was played into the record. At one point in this testimony the respondent is described as "starting to bounce off the walls" (A. 48). On recross-examination the trooper characterized his prior testimony as "overdramatized" and described the respondent as "scratching constantly"; as being driven "up the wall" as a result of the scratching (A. 51-52).

[2]Mass. Gen. Laws, c. 90, § 24(1)(e), provides, in pertinent part, that a reading of "ten one hundreths or more" creates a presumption that a person is under the influence of intoxicating liquor.

his car, and the respondent answered that he had more marihuana in his car. The respondent then stated that he could name some "biggies" (A. 40, 62), but Trooper Taliaferro told him that he did not want him to say anything further (A. 40, 62).

After the respondent was secured in a cell, Trooper Taliaferro prepared an application for a search warrant and an affidavit in support of that application (A. 41, 62). The affidavit reads, in material part, as follows:

> "On March 28, 1975 I assisted Chief Walter Zalenski [*sic*] Ashfield PD with a subject under arrest for operating under the influence. I gave the prisoner, Charles F. White his miranda [*sic*] rights. I than [*sic*] searched the prisoner and found (1) one marijuana cigarette in the breast pocket of his tee shirt colorgreen [*sic*]. I questioned the prisoner regarding the marijuana cigarette. He, Charles F. White stated that he had some marijuana in his vehicle which he had been driving at the time of his arrest." (A. 55-56, 62.)

A warrant for a search of the respondent's motor vehicle was issued on the basis of the application and the supporting affidavit (A. 57-58). Upon a search of the vehicle substantial quantities of various controlled substances plus $3,195 in cash were discovered in the vehicle's trunk (A. 58-59, 62).

Summary of the Argument.

This case involves the admissibility of physical evidence seized pursuant to a search warrant which was obtained through use of a statement made to police by respondent while he was in custody, having been fully advised of his rights as prescribed by *Miranda* v. *Arizona*, 384 U.S. 436 (1966). The court below subsequently held that the Commonwealth had not sustained the burden imposed by *Miranda* to demonstrate a knowing and intelligent waiver of the respondent's right to remain silent and right to counsel. The court held that the statement, taken in absence of proof of waiver, not only must be excluded from the prosecution's case in chief, but could not be used as a basis for probable cause for a search warrant, and therefore held that the real evidence seized should have been suppressed at trial.

The Commonwealth presents three distinct, but interrelated arguments in support of its contention that present federal standards do not require automatic exclusion for all purposes, of statements and of evidence obtained in violation of the principles of *Miranda*.

I. Recent decisions of this Court, such as *Harris* v. *New York*, 401 U.S. 222 (1971), and *Michigan* v. *Tucker*, 417 U.S. 433 (1974), have denied *Miranda* co-equal status with the Fifth Amendment and have described *Miranda* requirements as merely "prophylactic safeguards" designed to protect fundamental constitutional privileges and guarantees. Therefore, if the alleged violation of *Miranda* does not violate the Fifth Amendment privilege against compulsory self-incrimination, the exclusionary rule explicit in that Amendment is not applicable. Similarly, if the alleged violation of *Miranda* does not involve a denial of a specific constitutional guarantee, such as the Sixth Amendment right to counsel, the judicially created

exclusionary rule, designed to provide for enforcement of *constitutional* rights, is not automatically implicated.

In the instant case, the violation was of the *Miranda* waiver requirement only and therefore need not trigger per se application of the exclusionary rule.

II. Even if the Commonwealth is wrong in its analysis of the constitutional underpinnings of *Miranda*, it does not follow that the *Miranda* exclusionary rule is absolute and all-pervasive. Such a result conflicts with the decisions of this Court in *Harris* v. *New York*, *supra*, and *Michigan* v. *Tucker*, *supra*.

In general, the Court has permitted use of illegally obtained evidence for certain purposes. *United States* v. *Calandra*, 414 U.S. 338 (1974).

The Commonwealth submits that this Court has adopted a flexible approach in determining the extent to which judicial sanctions will be imposed and that this approach requires examination of the nature of the violation, and the collateral purpose for which the "illegally" obtained statement is to be used. In the instant case, the statement was used to establish probable cause for issuance of a search warrant. In such a proceeding otherwise inadmissible evidence such as hearsay is traditionally permitted, if reliable. Since the statement here was not elicited through coercive police methods which would render it involuntary and unreliable, to prohibit its use to obtain real evidence, which is reliable in itself, would not further the public interest in having guilt or innocence determined on the basis of trustworthy evidence. Where there is no evidence of flagrant or intentional bad faith action on the part of the police, the deterrent purpose of the exclusionary rule would not be effectuated by exclusion of real evidence.

III. The Fourth Amendment exclusionary rule which requires suppression of fruits of a direct constitutional violation (e.g., *Wong Sun* v. *United States*, 371 U.S. 471 [1963]) is inapplicable. The violation in the instant case is of *Miranda* prophylactic procedural rules only. Moreover, even if *Wong Sun* is applicable, its applicability should be limited to those situations in which police conduct rendered the statement involuntary. The *Miranda* violation is but one factor to be considered in addition to other relevant factors described in *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 226 (1973).

Argument.

The Automatic Exclusion of Statements Taken in Violation of Miranda v. Arizona, 384 U.S. 436 (1966), is Not Constitutionally Required.

A. *The Requirements of Miranda v. Arizona are Not Coextensive with the Fundamental Fifth Amendment Privilege Against Compelled Self-Incrimination.*

The precise constitutional issue addressed by the Court in *Miranda* v. *Arizona*, 384 U.S. 436 (1966), was the "admissibility of statements obtained from a defendant questioned while in custody." 384 U.S. at 445. In resolving this issue the Court articulated certain procedural safeguards which must be employed to protect the Fifth Amendment privilege against compelled testimony.

> "He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires. Opportunity to exercise

those rights must be afforded to him throughout the interrogation. After such warnings have been given, and such opportunity afforded him, the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement." 384 U.S. at 479.

The Court viewed these requirements as "fundamental with respect to the Fifth Amendment privilege" and as a prerequisite "to the admissibility of any statement made by a defendant." 384 U.S. at 476.

The factual premise for the majority's holding was a finding that police interrogation was so inherently coercive that, without the enumerated warning and waiver requirements, an individual's decision to speak could not be deemed to be free or voluntary.

> "Unless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice." 384 U.S. at 458.[3]

Subsequent analysis by this Court of the constitutional status of the *Miranda* requirements has led to the conclusion that these "protective devices" do not have independent, immutable, constitutional status, but are merely judicially created regulations for implementing constitutional commands, rather than constitutional commands in themselves.

In *Harris* v. *New York*, 401 U.S. 222, 226 (1971), this Court referred to *Miranda* requirements as a "shield." In *Michigan*

[3]See also *id.* at 457, 467.

v. *Tucker*, 417 U.S. 433 (1974), the requirements were described as a "series of recommended 'procedural safeguards,'" *id.* at 443; as "only . . . the prophylactic standards . . . laid down by this Court in *Miranda* to safeguard that privilege [against self-incrimination]." *Id.* at 446.

In analyzing the *Miranda* decision this Court stated:

> "The Court recognized that these procedural safeguards were not themselves rights protected by the Constitution but were instead measures to insure that the right against compulsory self-incrimination was protected. As the Court remarked:
>
> > '[W]e cannot say that the Constitution necessarily requires adherence to any particular solution for the inherent compulsions of the interrogation process as it is presently conducted.' *Id.*, at 467.
>
> "The suggested safeguards were not intended to 'create a constitutional straightjacket,' *ibid.*, but rather to provide practical reinforcement for the right against compulsory self-incrimination." *Michigan* v. *Tucker*, 417 U.S. at 444.

It is the Commonwealth's position that, in reaching this view of the *Miranda* safeguards as not being of constitutional status, this Court has implicitly rejected the constitutional underpinnings of *Miranda*, and by so doing has obviated the justification for automatic application of the exclusionary rule in all instances in which violations of strict *Miranda* requirements have occurred.

The underlying premise of *Miranda*, that coercion (in the Fifth Amendment sense) is inherent in any custodial interrogation, was rejected by this Court in *Michigan* v. *Tucker*, *supra*.[4]

[4]See generally, *The Supreme Court, 1973 Term*, 88 Harv. L. Rev. 41, 199-202; Ritchie, L.J., *Compulsion that Violates the Fifth Amendment: The Burger Court's Definition*, 61 Minn. L. Rev. 383, 418 (1977).

The *Tucker* analysis focused solely upon historical Fifth Amendment considerations, rather than the "*ipse dixit*"[5] of the *Miranda* court.

> "A comparison of the facts in this case with the historical circumstances underlying the privilege against compulsory self-incrimination strongly indicates that the police conduct here did not deprive respondent of his privilege against compulsory self-incrimination as such, but rather failed to make available to him the full measure of procedural safeguards associated with that right since *Miranda*. Certainly no one could contend that the interrogation faced by respondent bore any resemblance to the historical practices at which the right against compulsory self-incrimination was aimed.
>
> . . . . . .
>
> ". . . [H]is statements could hardly be termed involuntary as that term has been defined in the decisions of this Court.
>
> . . . . . .
>
> "Our determination that the interrogation in this case involved no compulsion sufficient to breach the right against compulsory self-incrimination does not mean there was not a disregard, albeit an inadvertent disregard, of the procedural rules later established in *Miranda*." *Michigan* v. *Tucker*, at 444-445.[6]

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[5] *Miranda* at 500 (separate opinion of Mr. Justice Clark).

[6] The Commonwealth recognizes that *Tucker* involved a pre-*Miranda* violation, but suggests that that fact does not militate against the view that the Court rejected the initial premise of *Miranda*, for that very premise was applied by the *Miranda* Court in viewing pre-*Miranda* custodial interrogations as inherently coercive.

To limit inquiry to historical considerations underlying the Fifth Amendment would be inconsistent with *Miranda*, which by its own terms went beyond the traditional concept of voluntariness, unless the Court was rejecting the "inherently coercive" premise.

> "In these cases, we might not find the defendants' statements to have been involuntary in traditional terms." *Miranda*, at 457.

The court has continued its implicit rejection of the "inherently coercive" concept in *Oregon* v. *Mathiason*, 429 U.S. 492 (1977), where this Court held that a statement made by a parolee who came to the police station, voluntarily, yet at the request of his parole officer, and was told that he was not under arrest, yet was told falsely that his fingerprints had been found at the scene of a burglary and who then confessed, prior to being given the *Miranda* warnings, was not in custody for *Miranda* purposes. The Court rejected the view that mere questioning at the station house constitutes a "coercive environment." *Mathiason*, at 495. This holding, the Commonwealth respectfully submits, differs substantially from the broad and darkly sinister picture of station house interrogation painted by the majority in *Miranda*.[7] Indeed, even without the formal announcement of arrest, Mathiason was subject to the same type of experience the *Miranda* decision sought to protect him against, i.e., the "incommunicado interrogation of individuals in a police-dominated atmosphere, resulting in self-incriminating statements without full warnings of con-

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[7] *Miranda*, at 445-458.

stitutional rights." *Miranda* at 445.[8] The Commonwealth submits, therefore, that this Court has rejected the premise that all police interrogation is inherently coercive.

Without such a premise the Fifth Amendment's direct command against compelled testimony would not operate to require automatic exclusion of statements obtained in violation of *Miranda* where those violations did not constitute an abridgement of the right against compulsory self-incrimination, but fell outside the realm of Fifth Amendment protection.

In further support of its position, the Commonwealth submits that this Court's recent decisions holding that statements taken in violation of *Miranda* may be admissible at trial for certain purposes, if they are found to be "otherwise trustworthy," demonstrate this Court's unwillingness to adopt a formalistic application of *Miranda*, and, in addition, constitute a rejection of the view that such violations necessarily implicate the Fifth Amendment.

In *Harris* v. *New York*, 401 U.S. 222 (1971), the statements of a defendant who had not been advised of his right to counsel were held admissible for impeachment purposes.

In *Oregon* v. *Hass*, 420 U.S. 714 (1975), the Court, holding that statements taken after a defendant had expressed a desire to speak with an attorney were admissible on rebuttal for impeachment purposes, stated:

> ". . . it does not follow from *Miranda* that evidence inadmissible against Hass in the prosecution's case in chief is barred for all purposes, always provided that 'the trustworthiness of the evidence satisfies legal standards.'

[8] See also, *Michigan* v. *Mosley*, 423 U.S. 96 (1975), holding that there is no per se proscription of indefinite duration against further questioning on any subject merely because a suspect indicates a desire to remain silent.

> [*Harris* v. *New York*,] 401 U.S., at 224." *Oregon* v. *Hass*, 420 U.S. at 722.

The Court in both cases noted the absence of evidence of coercion or involuntariness. *Harris* at 224; *Hass* at 722.

The implication of the above cases is that, contrary to *Miranda*, a confession or statement is not considered to be coerced in the Fifth Amendment sense merely because of failure to give the warnings or to observe them effectively. Rather, inquiry must be made as to voluntariness in the traditional sense. The Commonwealth submits that, had the court not abandoned the *Miranda* premise of "inherent coercion," the Court would not have allowed for a finding of "trustworthiness" and subsequent admissibility of the statements for other purposes. To do so without an implicit rejection of "inherent coercion" would be inconsistent with the well established principle that statements which are compelled in violation of the Fifth Amendment are per se inadmissible because they are in fact involuntary.

> "The use of coerced confessions, whether true or false, is forbidden because the method used to extract them offends constitutional principles." *Lego* v. *Twomey*, 404 U.S. 477, 485 (1972).

Inquiry as to trustworthiness or reliability is irrelevant to Fifth Amendment violations. *Rogers* v. *Richmond*, 365 U.S. 534, 540-541 (1961). If the statement is coerced, it is involuntary and therefore inadmissible by that reason alone. Hence, had this Court considered *Miranda* to be of parallel constitutional status with the Fifth Amendment, it would be inconsistent, at best, to hold that statements taken in violation of *Miranda* re-

quirements could be found to be "otherwise trustworthy" and thereby admissible in a judicial proceeding.

The Commonwealth respectfully suggests, therefore, that a violation of the *Miranda* requirements does not necessarily involve a violation of the specific constitutional guarantee against "compelled" testimony.

Since the exclusionary rule is a judicially created remedy for violations of *constitutional* rights, *United States* v. *Calandra*, 414 U.S. 338, 348 (1974), automatic application of that rule should only be mandated where the violation is of a constitutional right and not in an instance in which the violation involves only the prophylaxes of *Miranda*.

> "[I]n cases where incriminating disclosures are voluntarily made without coercion, and hence not violative of the Fifth Amendment, but are obtained in violation of one of the *Miranda* prophylaxes, suppression is no longer automatic." *Brewer* v. *Williams*, 430 U.S. 387, 424 (1977) (Burger, C.J., dissenting).

The Commonwealth submits that, contrary to the Supreme Judicial Court's equation of *Miranda* violations with violations of constitutional guarantees (*Commonwealth* v. *White* at 2812; A. 78), this Court has distinguished between the two and now requires automatic suppression only where the disclosures are obtained as a result of compulsion which operates to deny a specific constitutional right. *Michigan* v. *Tucker*, at 444-445. Compare *Brewer* v. *Williams*, *supra* (deliberate effort by the police to override a defendant's asserted right to counsel by *psychological coercion*).

The court below found only that the prosecution had not sustained its heavy burden of demonstrating a knowing and intelligent waiver of counsel and of the right to remain silent.

The court below inferred that the police officer himself did not regard the respondent as having waived these rights. *Commonwealth* v. *White*, *supra*, at 2811 (A. 77).[9] However, such a determination does not support the legal conclusion that police conduct denied to the respondent his Sixth Amendment right to counsel.

With regard to the respondent's right to counsel, it should be noted that there was no interrogation concerning the initial charge, "driving under the influence." The respondent asserted his right to counsel for the purpose of arranging bail (A. 33, 44), and, arguably, for future representation at trial (A. 26, 37), and at no point was the defendant ever prevented from making telephone calls to an attorney (A. 51). The "interrogation" consisted of a single question relating to the narcotic charges. While the prosecution may not have demonstrated a "knowing and intelligent" waiver of counsel under *Miranda*, nothing in the conduct of the police supports a finding that the respondent's underlying constitutional right to counsel had been abridged. Compare, *Escobedo* v. *Illinois*, 378 U.S. 478 (1964); *Brewer* v. *Williams*, *supra*.

The Commonwealth submits that the violation in the instant case was of one of the *Miranda* prophylaxes only and, therefore, automatic suppression was not required.

B. *Miranda v. Arizona, 384 U.S. 436 (1966), does Not Establish a Per Se Rule Requiring Exclusion of Evidence Obtained in Violation Thereof for All Purposes and in All Proceedings.*

The decision in *Miranda* v. *Arizona* was limited to the *admissibility* of statements in the prosecution's case in chief.

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[9] That the officer did not think that the respondent had waived his right in any absolute sense, but had merely made a voluntary response to a single inquiry concerning the new offense, is equally supportable.

Miranda, at 445. The Court did not address itself to what, if any, sanctions would be applied to the use of statements for collateral purposes,[10] nor did the Court specifically address the question of admissibility of real evidence obtained as a result of statements taken in violation of its safeguards.[11]

The Supreme Judicial Court, it is respectfully suggested, has, however, read *Miranda* to require automatic suppression for all purposes, except for impeachment. *Commonwealth* v. *Haas*, ____ Mass. ____, Mass. Adv. Sh. (1977) 2212, 2236, 369 N.E. 2d 692 (concurring opinion). In *Haas*, the court ruled that statements elicited without warnings, as required by *Miranda*, may not be used to form the basis for probable cause for arrest. The arrest was therefore held to be invalid and subsequent statements and evidence seized pursuant to that invalid arrest were rendered inadmissible. The concurring opinion makes clear that the court based its decision on what it considered binding decisions of this Court which automatically required suppression, even though "[t]he defendant's statements, which we are required to suppress, were voluntarily made, and they bore significant indicia of reliability." *Haas*, at 2236.

Suppression was, under the court's interpretation of federal standards, compelled, even though,

> "the police officers acted in good faith, attempting to observe proper legal standards. Their violation of those standards was not gross or wilful, was not of a kind likely to mislead the defendant, and did not create a significant risk that his statement . . . [was] untrue." *Haas*, at 2237.

[10]The Commonwealth suggests that the language of the Court: "unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him" (384 U.S. at 479), is unnecessary to the Court's decision and is dictum only. See, *Harris* v. *New York*, 401 U.S. 222, 224 (1971).

[11]The issue was raised on *Orozco* v. *Texas*, 394 U.S. 324 (1969), but was not reached.

In the instant case, the court continued its per se approach to prohibit automatically the use of statements taken in violation of *Miranda* waiver requirements for the purpose of securing a search warrant, stating,

> ". . . neither may such statements be used for the purpose of considering whether there was probable cause to obtain a search warrant. To hold otherwise would, in effect, sanction the initial violations of constitutional guaranties which the judge found took place in the police barracks. The need to prevent such violations from escaping review underlies the so called 'fruit of the poisonous tree' doctrine . . .." *Commonwealth* v. *White*, at 2812-2813 (A. 78).[12]

This broad interpretation of the judicial sanctions imposed by *Miranda* is inconsistent with the rulings of this Court permitting use of such statements at trial, although not permitting their use in the case in chief. Here the statement was utilized in a proceeding collateral to the trial, i.e., in obtaining a search warrant.

In *Harris* v. *New York*, *supra*, this Court held that statements made by a defendant in custody without being advised of his right to appointed counsel could be used to impeach the defendant's credibility should he testify at trial. The Court stated:

[12]The court apparently assumed without analysis that a violation of *Miranda* requirements was necessarily a violation of a constitutional right. As will be discussed, the Commonwealth suggests that violation of *Miranda* rules regarding waiver does not amount to a violation of constitutional guarantees and therefore the "fruit of the poisonous tree" doctrine is inapplicable.

> "It does not follow from *Miranda* that evidence inadmissible against an accused in the prosecution's case in chief is barred for all purposes, provided of course that the trustworthiness of the evidence satisfies legal standards." 401 U.S. at 224.

The Court noted that there was no suggestion "that the statements made to police were coerced or involuntary." *Id.* at 224.

Under these circumstances, the Court then balanced the deterrent effect of exclusion against society's interest in a full and fair hearing, stating:

> "The impeachment process here undoubtedly provided valuable aid to the jury in assessing petitioner's credibility, and the benefits of this process should not be lost . . . because of the speculative possibility that impermissible police conduct will be encouraged thereby. Assuming that the exclusionary rule has a deterrent effect on proscribed police conduct, sufficient deterrence flows when the evidence in question is made unavailable to the prosecution in its case in chief." *Id.* at 225.

Again, in *Michigan* v. *Tucker*, 417 U.S. 433 (1974), the defendant had been given incomplete *Miranda* warnings; his statements led police to a third party witness who testified at trial. The Court held that use of this testimony was not a forbidden derivative use of the defendant's initial statements, and, in so doing, explicitly distinguished between a *Miranda* violation and a violation of the constitutional privilege against self-incrimination.[13] *Michigan* v. *Tucker*, at 444.

[13]The court below did not acknowledge this distinction. *White*, at 2812-2813 (A. 78-79). Moreover, in *Michigan* v. *Tucker*, this Court also rejected the notion that the imperative of "judicial integrity" provides an independent basis for excluding derivative evidence. The court below apparently invoked this concept as a basis for its decision. *White*, at 2812 (A. 78).

The Court, noting that the interrogation involved "no compulsion sufficient to breach the right against seif-incrimination" (*id.* at 445), held that the interests of justice in a full hearing on the basis of all trustworthy evidence outweighed the value of a deterrent effect, if any, in the exclusion of such evidence.

This Court has repeatedly rejected a per se application of the exclusionary rule. In *United States* v. *Calandra*, 414 U.S. 338 (1974), the Court held that evidence seized in violation of the Fourth Amendment, though inadmissible at trial, could be used in grand jury proceedings. Similarly, the Court has declined to extend the exclusionary rule to hold inadmissible in a federal civil tax proceeding evidence obtained by a state law enforcement officer pursuant to a search warrant later proved to be defective. *United States* v. *Janis*, 428 U.S. 433 (1976). Most recently, this Court has held admissible living witness testimony which was the fruit of an illegal search. *United States* v. *Ceccolini*, ____ U.S. ____, 22 Cr. L. 3510 (1978). In general, the Court has declared:

> "Despite its broad deterrent purpose, the exclusionary rule has never been interpreted to proscribe the use of illegally seized evidence in all proceedings or against all persons." *Brown* v. *Illinois*, 422 U.S. 590, 600 (1975).

The thrust of these cases, it is submitted, constitutes an obvious rejection of a per se, inflexible application of the exclusionary rule to proscribe use of illegally seized evidence for all

purposes in all proceedings. The inflexible application of the exclusionary rule utilized by the court below is simply not required under federal standards.

Consistent with *Michigan* v. *Tucker*, a determination to apply the exclusionary rule should take into account the nature of the violation, the nature of the proceeding in which the statement is sought to be used, and the effect of applying the exclusionary rule, balanced against the interests of justice and society in having guilt or innocence determined on the basis of trustworthy evidence.

1. Nature of the Violation.

In the instant case, the respondent was read his rights on three occasions, the last warning immediately preceding his unsolicited statement that he did not think possession of a single marihuana cigarette was a crime (A. 67). The only interrogation was a casual response to his voluntary statement, consisting of a single question, "Do you have any more?" (A. 27, 40). When the respondent answered that he had more in his car and offered to name some "biggies," all inquiry ceased (A. 67). The trial judge found: "In this case the arresting officers were scrupulous in their efforts to obey the mandate of *Miranda*" (A. 67). There is nothing in the record to indicate any deliberate police misconduct, or any dishonesty of purpose or effort to coerce or cajole the respondent. Compare, *Brewer* v. *Williams*, 430 U.S. 387 (1977).

The single factor which the court below found to violate *Miranda* was that the respondent's waiver was not "knowingly and intelligently" made (A. 62-63). The facts underlying this finding do not support a finding of involuntariness, nor did the trial judge so find.[14]

[14]It is open to this Court on the question of waiver, as a matter of federal constitutional law, to apply constitutional principles to the facts as found by the state court. See *Brown* v. *Allen*, 344 U.S. 443, 507 (1953) (separate opinion); *Brewer* v. *Williams*, 430 U.S. 387, 404 (1977).

Under Mass. Gen. Laws c. 90, § 24(1)(e), a .13 reading creates merely a statutory (rebuttable) presumption that an individual is "under the influence" of intoxicating liquor for the purpose of driving: a condition short of intoxication. *Commonwealth* v. *Lyseth*, 250 Mass. 555 (1925).

Evidence that the respondent was "under the influence" to a degree which might affect his ability to waive intelligently his rights does not lead necessarily to the conclusion that his statements were involuntary.[15] Comparison of the facts in this case with *Commonwealth* v. *Hosey*, 368 Mass. 571 (1971), is instructive. Hosey was arrested for drunkenness and then subjected to interrogation for over an hour and a half in connection with a sexual assault on a child; he was described as "extremely emotional," "extremely high," "abnormal" and "detached from reality." *Hosey*, at 575, 579. Although given his *Miranda* warnings, ". . . the police gratuitously indicated to the defendant that it would be difficult to get a lawyer at that hour [approximately 5:00 a.m.] though his right could be exercised 'if he insisted.'" *Hosey*, at 577-578. The condition of defendant Hosey requiring the subsequent finding of "no knowing and intelligent waiver" was later described as ". . . the breakdown of cognition and volition [which] was evident and very serious" in *Commonwealth* v. *Fielding*, ____ Mass. ____, Mass. Adv. Sh. (1976) 2290, 2310, n. 23.

No such extreme disorientation is present in the instant case, nor was the respondent subjected to "interrogation" beyond a

[15]Compare, *Robinson* v. *State*, 208 Tenn. 521, 347 S.W. 2d 41 (1961) (defendant with a .23 reading capable of a voluntary statement); *State* v. *Beasely*, 10 N.C. App. 663, 179 S.E. 2d 820 (1971) (.14 reading did not render statement involuntary); *Ritter* v. *State*, 3 Tenn. Cr. 372, 462 S.W. 2d 247 (1970) (.135 reading did not render statement involuntary).

single question, nor did the police make any deliberate attempt to prevent consultation with counsel.

The Commonwealth submits that nothing in the record indicates involuntariness in the Fifth Amendment sense. Under these circumstances the alleged violation is of *Miranda* waiver requirements only. Indeed, the Supreme Judicial Court indicated that something less than constitutionally prohibited conduct had occurred, when it stated: ". . . the more *prudent* and constitutionally preferable course would have been for the police to withhold any further questioning 'until [the defendant] was clearly capable of responding intelligently.'" *White*, at 2811 (A. 77) (emphasis added). This statement indicates that the Court viewed the police conduct as violating not a constitutional rule, but merely the prophylactic waiver requirement of *Miranda*.

2. Nature of the Collateral Proceeding.

The statement in question was used as a basis for probable cause for the issuance of a search warrant (A. 55-56). Evidence, although inadmissible at trial because it is hearsay, has traditionally been an appropriate basis for determining probable cause for a search warrant. The constitutional limitation on the use of such evidence is that it be reliable. *Aguilar* v. *Texas*, 378 U.S. 108 (1964); *Spinelli* v. *United States*, 393 U.S. 410 (1969). As *Tucker*, *Hass*, and *Harris* make clear, a violation of *Miranda* does not result in unreliability absent a showing of coercion. Provided all other constitutional standards are met, the reliability or truth of the statement in question may be quickly verified. The evidence or contraband will be discovered pursuant to the warrant, or not. If it is discovered, the statement obviously was reliable.

If the evidence is not discovered, the defendant will not in any way be disadvantaged by the use of his statement for this purpose.

Moreover, the use of the statement in question to establish probable cause for issuance of a search warrant is analogous to the use of a consent under certain circumstances to validate a warrantless search. A consent to search given after a suspect is placed under arrest and is in custody, but has not yet been given *Miranda* warnings, has been held to be valid and admissible on a motion to suppress in order to validate the search. *United States* v. *Hall*, 565 F. 2d 917 (5th Cir. 1978); *United States* v. *Lemon*, 550 F. 2d 467 (9th Cir. 1977); *United States* v. *Horton*, 488 F. 2d 374 (5th Cir. 1973); *State* v. *Wallace*, ____ S.C. ____, 238 S.E. 2d 675 (1977).

In the instant case, the statement was used to satisfy Fourth Amendment requirements of probable cause only. The Commonwealth submits that no logical distinction can be drawn between the use of consent, where the defendant is in custody and not warned of his *Miranda* rights, to satisfy Fourth Amendment requirements, and the use of the respondent's statement here to satisfy the Fourth Amendment requirement of probable cause. The fact that the statements are later held to be inadmissible at trial for lack of an intelligent waiver (the only sanction specifically required by *Miranda*) should not affect their use as a basis for a determination that probable cause exists for the issuance of a search warrant.

3. The Effect of Application of the Exclusionary Rule.

The purpose underlying application of the exclusionary rule is to deter future police misconduct.

> "The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in

willful, or at the very least negligent, conduct which has deprived the defendant of some right. . . . Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force." *Michigan* v. *Tucker*, *supra*, at 447.

In the case at bar there is no evidence of wilful or deliberate police misconduct. In fact, the trial judge found:

> "In this case the arresting officers were scrupulous in their efforts to obey the mandate of *Miranda*." (A. 67.)

The respondent was read the warnings on three occasions. He was free to use the telephone and did so. There is no evidence of any extended interrogation; in fact, there was only a single question put to the respondent after he was charged and warned on the new offense. It is difficult, if not impossible, the Commonwealth suggests, to articulate a positive deterrent rationale for exclusion of the statement for the purpose of securing a search warrant.[16] The discussion of the issue in *Hass*, *supra*, is instructive:

> "The deterrence of the exclusionary rule, of course, lies in the necessity to give the warnings.
>
> . . . . . .
>
> "One might concede that when proper *Miranda* warnings have been given, and the officer then continues his

[16]The Commonwealth submits that the effect could indeed be negative, suggesting to police officers that, rather than proceed in a proper manner and secure a search warrant, they merely wait until the automobile is secured at the police station and then conduct an inventory of its contents.

> interrogation after the suspect asks for an attorney, the officer may be said to have little to lose and perhaps something to gain by way of possibly uncovering impeachment material. This speculative possibility, however, is even greater where the warnings are defective and the defect is not known to the officer. In any event, the balance was struck in *Harris*, and we are not disposed to change it now. If, in a given case, the officer's conduct amounts to abuse, that case, like those involving coercion or duress, may be taken care of when it arises measured by the traditional standards for evaluating voluntariness and trustworthiness." *Hass*, *supra*, 420 U.S. at 723.

That the officer was unaware of any defect in the procedure by which the respondent's statement was elicited and was acting in good faith is evidenced by his offer of the statement in his affidavit in support of the application for a search warrant (A. 56).

Given only a speculative possibility that exclusion of the real evidence seized pursuant to an otherwise valid warrant would provide a positive deterrent effect on future police conduct, the Commonwealth suggests that the interest of the public and the interests of justice in having a defendant's guilt or innocence determined on the basis of trustworthy evidence compels a result contrary to that reached by the Supreme Judicial Court. *Michigan* v. *Tucker*, *supra*. The Supreme Judicial Court's automatic, per se application of the exclusionary rule is simply not compelled by federal standards and is inconsistent with this Court's efforts to balance the conflicting interests involved before applying the rule. Within the Fourth Amendment context this Court has recognized that the policies behind the exclusionary rule are not absolute. *Stone* v. *Powell*, 428 U.S. 465 (1976).

"I tend generally to share the view that the *per se* application of an exclusionary rule has little to commend it except ease of application. All too often applying the rule in this fashion results in freeing the guilty without any offsetting enhancement of the rights of all citizens. Moreover, rigid adherence to the exclusionary rule in many circumstances imposes greater cost on the legitimate demands of law enforcement than can be justified by the rule's deterrent purposes. . . . I therefore have indicated, at least with respect to Fourth Amendment violations, that a distinction should be made between flagrant violations by the police, on the one hand, and technical, trivial, or inadvertent violations, on the other. . . ." *Brewer* v. *Williams*, 430 U.S. 387, 413-414, n. 2 (1977) (concurring opinion of Mr. Justice Powell).

The Commonwealth would urge the Court to apply the same flexible approach to application of the exclusionary rule to a case falling solely within the context of *Miranda* v. *Arizona*, where police conduct is neither "flagrant" nor coercive.

C. *The "Fruit of the Poisonous Tree" Doctrine does Not Require Exclusion of the Evidence Seized from the Respondent's Motor Vehicle.*

The court below held that the evidence obtained from the defendant's automobile must be excluded under the "fruit of the poisonous tree" doctrine. The court followed its previous decision in *Commonwealth* v. *Haas, supra*, in which it was held that statements taken in violation of *Miranda* v. *Arizona* could not be considered in determining probable cause for arrest and that subsequent statements and items seized must be suppressed under *Wong Sun* v. *United States*, 371 U.S. 471 (1963).

The Commonwealth submits that this Court, however, has never applied the *Wong Sun* doctrine to *Miranda* violations, although the Court has indicated that in a "proper" case the doctrine might have applicability. *Michigan* v. *Tucker*, at 447. The Commonwealth submits that the "proper" case, unlike the instant case, would be one involving coercion or bad faith conduct on the part of police officers.

The Commonwealth further submits that the "fruit of the poisonous tree" doctrine does not apply unless the initial illegality is of constitutional dimension and, further, that the deterrent purpose of the exclusionary rule in general would not be furthered by such application.

Wong Sun prohibited use of evidence derived from an illegal arrest and search which violated Fourth Amendment rights. Thus, the "primary illegality" which triggered application of the prohibition against use of derivative evidence involved a constitutional violation.

However, in *Michigan* v. *Tucker*, the Court expressly rejected an equivalence between *Miranda* violations and constitutional violations. 417 U.S. at 444-445. The Court, although finding that *Miranda* had been violated, did not apply the *Wong Sun* doctrine, stating:

> "This Court has also said, in *Wong Sun* v. *United States*, . . . that the 'fruits' of police conduct which actually infringed a defendant's Fourth Amendment rights must be suppressed. But we have already concluded that the police conduct at issue here did not abridge respondent's constitutional privilege against self-incrimination, but departed only from the prophylactic standards later laid

down by this Court in *Miranda* to safeguard that privilege." *Michigan* v. *Tucker*, at 445-446.

The clear implication of *Tucker* is that the "fruit of the poisonous tree" doctrine would not be triggered unless that primary illegality involved an invasion of a specific *constitutional* guarantee and that a mere *Miranda* violation does not reach such a constitutional dimension.[17]

The "fruits" doctrine has been held by several lower courts to be inapplicable to *Miranda* violations in the absence of involuntariness. *United States ex rel. Hudson* v. *Cannon*, 529 F. 2d 890 (7th Cir. 1976);[18] *Simmons* v. *Clemente*, 552 F. 2d 65 (2d Cir. 1977). See *Bertram* v. *State*, 33 Md. App. 115, 364 A. 2d 1119 (1976), and cases cited therein;[19] *Rhodes* v. *State*, 91 Nev. 17, 530 P. 2d 1199 (1975).[20]

[17]This interpretation is consistent with *Brown* v. *Illinois*, 422 U.S. 590 (1975). In *Brown*, the initial coercion arose from an arrest without probable cause in direct contravention of a constitutional guarantee. The Court merely held that the subsequent giving of *Miranda* warnings could not dissipate that taint.

[18]The Ninth Circuit, in *United States* v. *Lemon*, *supra*, 550 F. 2d at 472, did not resolve the issue, for the court held that a statement eliciting a consent to search did not implicate a Fifth Amendment right and therefore *Miranda* was inapplicable. The court, noting that *Miranda* warnings are not constitutional rights in themselves, did, however, hold that statements elicited prior to *Miranda* warnings could be introduced at a pre-trial suppression hearing to establish the validity of a search. But see *Tremayne* v. *Nelson*, 537 F. 2d 359 (9th Cir. 1976). See also *Null* v. *Wainwright*, 508 F. 2d 340 (5th Cir. 1975), cert. denied, 421 U.S. 970 (1975).

[19]In *In re Appeal No. 245*, 29 Md. App. 131, 349 A. 2d 434 (1975), the court acknowledged the distinction, but found a fundamental violation of the constitutional right against self-incrimination. It is important to note that the court also found the initial illegal detention to be "patently flagrant." 29 Md. App. at 145, 349 A. 2d at 442.

[20]In a pre-*Tucker* case, *Keister* v. *Cox*, 307 F. Supp. 1173 (W.D. Va. 1969), a federal district court indicated its view that the Fifth Amendment as

The Commonwealth submits that the only justification for extension of the *Wong Sun* doctrine to situations involving the Fifth Amendment flows from a determination that the initial statement leading to derivative real evidence was involuntary as a result of compulsion or intentional bad faith conduct on the part of police which could be deemed to have "overborne the will" of the accused. In the instant case, no such finding of involuntariness has been made, nor would the facts support such a finding under the "totality of the circumstances" test. In *Schneckloth* v. *Bustamonte*, 412 U.S. 218 (1973), this Court outlined the factors to be considered in determining voluntariness:

> ". . . the youth of the accused, *e.g.*, *Haley* v. *Ohio*, 332 U.S. 596; his lack of education, *e.g.*, *Payne* v. *Arkansas*, 356 U.S. 560; or his low intelligence, *e.g.*, *Fikes* v. *Alabama*, 352 U.S. 191; the lack of any advice to the accused of his constitutional rights, *e.g.*, *Davis* v. *North Carolina*, 384 U.S. 737; the length of detention, *e.g.*, *Chambers* v. *Florida*, *supra*; the repeated and prolonged nature of the questioning, *e.g.*, *Ashcraft* v. *Tennessee*, 322 U.S. 143; and the use of physical punishment such as

construed by *Miranda* did not necessarily operate to exclude physical evidence discovered as a result of disclosures made in violation of *Miranda*. The court, while apparently of the view that *Miranda* requirements were of parallel, co-equal status with the Fifth Amendment, distinguished between the Fifth Amendment bar as to compelled "testimony" and "real" evidence obtained through compulsion, citing *Schmerber* v. *California*, 384 U.S. 757, 764 (1966):

> "Under *Schmerber* and *Killough* then, the gun is not necessarily made inadmissible by the mere fact that Keister showed the office[r] its whereabouts having not been first given the requisite warning under *Miranda*. The Commonwealth will have to identify the gun other than by *statements* made by the accused while in custody as a result of police interrogation." 307 F. Supp. at 1176.

the deprivation of food or sleep, *e.g.*, *Reck* v. *Pate*, 367 U.S. 433." 412 U.S. at 226.

See generally *Miranda* v. *Arizona*, *supra*, at 508 (Harlan, J., dissenting).

Argument on sentencing revealed that the respondent was a student at the University of Massachusetts.[21] He was advised of his constitutional rights on three occasions, the last being immediately prior to the statements in question. He was in custody at the State Police barracks for less than one hour. Interrogation was neither prolonged nor repeated. The interrogation, if it may be so deemed, consisted of one question posed by the officer in response to an unsolicited statement by the respondent. There is, moreover, absolutely no evidence of bad faith or coercion. Indeed, the only evidence supporting the finding of no intelligent waiver is that the respondent voluntarily ingested sufficient alcohol to raise the statutory presumption that he was under the influence of alcohol, and that his motor responses were impaired, in that he was "dropping coins" and "bouncing around."

The Commonwealth suggests that application of the exclusionary rule to require suppression of otherwise reliable and probative evidence discovered under circumstances free of coercive or bad faith conduct serves neither to effectuate the purpose of the exclusionary rule nor to best serve the interests of justice.

The primary purpose of the exclusionary rule is to deter future police misconduct.

> "'The rule is calculated to prevent, not to repair. Its purpose is to deter — to compel respect for the constitutional

[21] Transcript, *Commonwealth* v. *White*, at 71.

> guaranty in the only effectively available way — by removing the incentive to disregard it.'" *United States* v. *Calandra*, 414 U.S. 338, 347 (1974), quoting *Elkins* v. *United States*, 364 U.S. 206, 217 (1960).

In order to effectuate this purpose logically some intentional, bad faith conduct must be involved. *Oregon* v. *Hass*, *supra*. No such showing has been made.

The real evidence under attack in the instant case, as opposed to compelled testimony, carries its own indicia of reliability. Therefore, the alternative justification for application of the exclusionary rule — to protect "the courts from reliance on untrustworthy evidence" (*Michigan* v. *Tucker*, at 448) — is also inapplicable.

The rationale of *Michigan* v. *Tucker* is applicable to the instant case. The court below has erred in attributing immutable, independent constitutional status to the *Miranda* safeguards in direct conflict with this Court's directives. The Supreme Judicial Court, the Commonwealth respectfully submits, has read too broadly the exclusionary requirements of *Miranda* v. *Arizona* as requiring per se exclusion for all purposes of statements taken in violation of its prophylactic standards.

Conclusion.

For the reasons stated above, the Commonwealth respectfully requests that the judgment of the Supreme Judicial Court be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1388

COMMONWEALTH OF MASSACHUSETTS,

Petitioner,

v.

CHARLES F. WHITE,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS

BRIEF OF THE RESPONDENT

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OPINIONS BELOW

The opinion of the Supreme Judicial Court for the Commonwealth of Massachusetts is reported at Mass. Adv. Sh. (1977) 2805, 371 N.E. 2d 777 (1977) (A. 72).

JURISDICTION

The decision of the court below was entered on December 30, 1977. The jurisdiction of this Court has been invoked pursuant to 28 U.S.C. section 1257(3).

The respondent respectfully suggests that the "judgment" of the court below is an inadequate basis for jurisdiction under 28 U.S.C. section 1257(3) because the judgment lacks finality.

Additionally, respondent maintains that because the decision of the Supreme Judicial Court may rest on an adequate and independent state ground, that this Court should either dismiss the writ of certiorari as improvidently granted or remand the case to the Supreme Judicial Court of Massachusetts for clarification of the basis of its decision.

QUESTIONS PRESENTED

1. Whether the decision of the Supreme Judicial Court of Massachusetts reversing a judgment of guilty and setting aside findings of a trial judge who denied in part a motion to suppress evidence in a criminal case is a final order under 28 U.S.C. section 1257(3).

2. Whether this honorable Court should dismiss the writ of certiorari as improvidently granted or remand the case to the Supreme Judicial Court of Massachusetts to determine if its decision is based on an adequate and independent state ground.

3. Whether the fruit of a statement held inadmissible at trial because the defendant was incapable of waiving his right against self-incrimination may be used as evidence in the prosecution's case in chief.

4. Whether the respondent's Sixth Amendment right to counsel was violated by his being interrogated by a police officer who did not regard the respondent as having waived his rights to silence and counsel; said

interrogation having taken place after the respondent's repeated attempts to secure an attorney had failed.

CONSTITUTIONAL PROVISIONS INVOKED

1. The United States Constitution Amendment 4; "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizure, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

2. The United States Constitution Amendment 5; "No person . . . . . nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; . . . . ."

3. The United States Constitution Amendment 6; "In all criminal prosecutions, the accused shall enjoy the right . . . . .to have the Assistance of Counsel for his defence.

4. The United States Constitution Amendment 14; "Section 1, ... nor shall any State deprive any person of life, liberty, or property, without due process of law . . . . ."

5. Constitution of the Commonwealth of Massachusetts Pt. 1, Article XII; "No subject shall be held to answer for any crimes or offence, until the same is fully and plainly, substantially and formally, described to him or be compelled to accuse, or furnish evidence against himself. And every subject shall have a right to

produce all proofs, that may be favorable to him; to meet the witnesses against him face to face, and to be fully heard in his defence by himself, or his counsel, at his election. . . . . "

STATEMENT OF THE CASE

Prior Proceedings

On September 9, 1975, the Franklin County Grand Jury returned four indictments charging the respondent, Charles F. White, with unlawful possession with intent to distribute controlled substances, namely marihuana, amphetamines, cocaine and L.S.D. in violation of Massachusetts General Laws, chapter 94C section 31.

On October 25, 1975, the respondent filed a Motion to Suppress Evidence with affidavit, seeking to suppress statements made while in custody and property seized from an automobile the result of a search warrant.

On January 29, 1976, after a pre-trial hearing, a judge of the Superior Court of the Commonwealth issued "Findings and Rulings in Re Motion to Suppress Evidence". The judge found that the Commonwealth had failed to demonstrate that the respondent had knowingly and intelligently waived his privilege against self-incrimination and his right to counsel and therefore, the respondent's statements must be suppressed. (A. 62-63).

However, the judge went on to find that the statement could be used to establish probable cause for

the issuance of a search warrant and declined to suppress the drugs and currency seized from the trunk of the automobile, pursuant to said search warrant (A. 68). The respondent filed an exception to the "Findings and Rulings" (A. 69).

On appeal, the Supreme Judicial Court, in a unanimous decision, reversed. The Supreme Judicial Court upheld the Superior Court judge's determination that the respondent had not waived his right to counsel or his privilege against self-incrimination (A. 77-78). The court further held that the illegally obtained statement could not be used to establish probable cause to obtain a search warrant and that evidence seized during the execution of the search warrant must be suppressed. Commonwealth v. White, ____ Mass. ____, Mass. Adv. Sh. (1977) (A. 72).

Statement of the Facts

The facts as found by the Superior Court judge in his "Findings and Rulings in Re Motion to Suppress Evidence" (A. 59-68) and adopted by the Supreme Judicial Court (A. 72-81), may be summarized as follows.

On March 28, 1975 at approximately 2:00 A.M., Walter Zalenski, Chief of Police of the town of Ashfield, after notification of an automobile accident had proceeded to the scene. Chief Zalenski found the respondent behind the wheel of an automobile that had gone off the road and over an embankment (A. 60, 73).

Chief Zalenski noticed that the defendant appeared to be under the influence of either drugs or alcohol or

both (A. 60, 73). His eyes appeared glassy, his speech was somewhat slurred and there was a strong odor of alcohol on his breath (A. 60). The Chief ordered the respondent from the motor vehicle, read him the *Miranda* warnings and placed him under arrest for operating under the influence (A. 60, 73). The respondent walked up to the police cruiser without assistance but with some degree of staggering (A. 60, 73).

Chief Zalenski called the Massachusetts State Police for assistance. Trooper Frederick Taliaferro arrived at the scene and was told by the Chief that the respondent was under arrest. The Chief requested that Trooper Taliaferro administer the respondent a breathalyzer test at the State Police Barracks (A. 60).

Upon arrival at the barracks Trooper Taliaferro read the respondent the *Miranda* warnings and advised him of his right to a breathalyzer test and his right to make a telephone call. The respondent agreed to submit to the breathalyzer test (A. 60, 74).

Prior to the administration of the test, the respondent attempted to use a coin operated telephone to retain the services of an attorney (A. 61, 74). The respondent had difficulty using the telephone, dropping coins on the floor several times (A. 61, 74). He succeeded in completing two calls but was unable to obtain representation (A. 61, 74). The respondent at no time indicated that he intended to abandon his efforts to secure representation or that he had changed his mind with regard to that objective (A. 63, 77). Trooper Taliaferro did not regard the respondent as having waived his right to silence or his right to counsel. (A. 63, 77).

The Superior Court judge and the Supreme Judicial Court also found that during this time at the barracks that the respondent "bounce(d) around," was "bouncing off the walls", was scratching himself in an unusual manner and "didn't know what he was doing" (A. 63, 74).

The respondent took a breathalyzer test with a result of thirteen one hundredths percentage by weight of alcohol in the respondent's blood. This result created a statutory presumption that the respondent was under the influence of alcohol.[1]

While preparing to place the respondent in a cell, Trooper Taliaferro searched the respondent and found what appeared to be a marihuana cigarette. The trooper informed the respondent he would be charged with possession of marihuana and again read the *Miranda* warnings (A. 61, 74). The respondent replied that he saw nothing wrong in the possession of one marihuana cigarette (A. 61, 74).

Trooper Taliaferro then questioned the respondent if he had any other marihuana on his person or in his car and the respondent replied that he had some marihuana in his car (A. 61-62, 74). The respondent also stated that he could name some "biggies" to which the trooper replied that he did not wish to inquire any further (A. 62, 74).

After securing the respondent in a cell, Trooper Taliaferro sought a search warrant for the automobile (A. 62, 74-75). The affidavit in support of said application stated in material part:

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[1] Massachusetts General Laws chapter 90, section 24 (1)(e) provides that a reading of "ten one hundredths or more" creates a presumption that a person is under the influence of intoxicating liquor.

"On March 28, 1975 I assisted Chief Walter Zalenski (sic) Ashfield PD with a subject under arrest for operating under the influence. I gave the defendant, Charles F. White his Miranda rights (sic). I than (sic) searched the prisoner and found (1) one marijuana cigarette in the breast pocket of his tee shirt color green (sic). I questioned the prisoner regarding the marijuana cigarette. He, Charles F. White stated that he had some marijuana in his vehicle which he had been driving at the time of his arrest" (A. 55-56, 62, 75).

A search warrant was issued based on this affidavit (A. 57-58). The search of the motor vehicle resulted in the seizure from the trunk of various controlled substances and cash (A. 58-59, 62). That property and the respondent's oral statements to Trooper Taliaferro were the subjects of the respondent's Motion to Suppress Evidence. (A. 60, 75).

SUMMARY OF ARGUMENT

This case involves the admissibility of evidence seized during the execution of a search warrant. The affidavit in support of the search warrant was based on a statement which was illegally obtained in violation of the safeguards of *Miranda v. Arizona*, 384 U.S. 436 (1966), the Fifth and Sixth Amendments to the Constitution of the United States and Part 1 Article XII of the Constitution of the Commonwealth of Massachusetts.

The court below found that the respondent had not knowingly or intelligently waived his rights to counsel

or his privilege against self-incrimination and that his statement could not be used to establish probable cause for the issuance of the search warrant. The court concluded that controlled substances and currency seized pursuant to the search warrant must be suppressed.

The respondent contends that since he is subject to further proceedings in Massachusetts, including a new trial, that the judgment of the court below is an inadequate basis for jurisdiction under 28 U.S.C. section 1257(3) because the judgment lacks finality.

Additionally, it is submitted that because the decision of the court below may have been based on violations of the Constitution of the Commonwealth of Massachusetts, Pt. I Article XII, this Court should dismiss the writ of certiorari as being improvidently granted. In the alternative, it is suggested that "consistent with the respect due the highest courts of states of the Union that they be asked rather than told what they have intended" Herb v. Pitcairn, 324 U.S. 117, 128 (1945), this Court should remand the case to the Supreme Judicial Court of Massachusetts to determine the basis of its decision.

Respondent suggests five separate but interrelated arguments that support his contention that the unanimous decision of the Supreme Judicial Court should be affirmed.

1. The questioning of the respondent absent a valid waiver, and in the circumstances of the case at bar violated both *Miranda v. Arizona*, 384 U.S. 436 (1966) and the Fifth Amendment. The requirement of a valid waiver is "fundamental with respect to the Fifth Amendment privilege". *Miranda* supra at 476.

Respondent concedes that the Miranda warnings and waiver procedure is not the only possible solution to the problem of the inherent compulsion of the interrogation process but it is contended that the Fifth Amendment requires that they be observed until other procedures are formulated which are at least as effective in protecting the accused's rights to silence and counsel.

Additionally, *Michigan v. Tucker*, 417 U.S. 433 (1974) is distinguishable from the case at bar. *Tucker* involved pre-Miranda interrogation while the questioning in the case at bar took place many years post-Miranda. Further, the defendant in Tucker did not accuse himself and when asked if he wanted an attorney, he replied he did not. In contrast, the respondent's statement in the case at bar was accusatory and the respondent affirmatively demonstrated that he was desirous of counsel. Moreover, the police officer who questioned the respondent did not regard the respondent as having waived his rights to silence or counsel.

Additionally, the respondent submits that his statement, unlike the statement in Tucker, was involuntary.

2. The evidence obtained pursuant to the execution of the search warrant must be suppressed because it was obtained as the result of a violation of the respondent's Fifth Amendment rights. Respondent suggests that the admission of said evidence would violate *Miranda*, the Fifth Amendment and the theory underlying the fruit of the poisonous tree doctrine.

This Court in *Miranda* stated that "until such warnings and waiver are demonstrated by the

prosecution at trial, *no evidence obtained as a result of interrogation can be used against him*". *Miranda* supra at 479 (emphasis supplied).

Further, if the police were allowed to use illegally obtained statements for leads, the *Miranda* requirements would be meaningless for the police could accomplish indirectly what they could not do directly.

Additionally, the Fifth Amendment by its own terms requires suppression in the case at bar. Unlike the Fourth Amendment, the Fifth Amendment is directly concerned with the introduction of tainted evidence at trial. *United States v. Janis*, 428 U.S. 433, 443 (1976). Therefore, the deterrent rationale of the Fourth Amendment exclusionary rule is not applicable to the case at bar.

Further, this Court has consistently held that the Fifth Amendment requires that evidence derived from compelled testimony is not admissible. *Murphy v. Waterfront Commission* 378 U.S. 52 (1964).

Finally, the fruit of the poisonous tree doctrine is applicable to the case at bar and requires suppression.

3. The evidence seized from the automobile must be suppressed as the fruit of a violation of the respondent's Sixth Amendment right to counsel. Both the Superior Court judge and the Supreme Judicial Court found that the respondent had affirmatively demonstrated a desire for counsel and never changed his mind in that regard. Additionally, the state trooper did not regard the respondent as having waived his right to counsel. Questioning under these circumstances violated the Sixth Amendment and evidence derived from the illegal interrogation should be suppressed. (see, e.g., *Escobedo v. Illinois*, 378 U.S. 478, (1964); *Brewer v. Williams*, 430 U.S. 387 (1977).

4. The illegally obtained statement was a critical element in the affidavit in support of the search warrant and therefore evidence seized pursuant to said search warrant must be suppressed. *United States v. Giordano*, 416 U.S. 505 (1974). Alternatively, without the illegally obtained statement, there was no probable cause for the issuance of the warrant and evidence seized pursuant to said warrant must be suppressed. (see e.g., *United States v. Giordano* supra at 555, dissenting opinion of Powell, J.)

5. Even if the questioning violated only the *Miranda* prophylactic safeguards, the decision below should be affirmed. The interest of the government in making available to the trier of fact all available evidence is outweighed by the need to provide effective sanctions to uphold constitutional rights. The allowance into evidence of the controlled substances and currency which were seized pursuant to the search warrant would encourage the police to violate the law because they would have everything to gain and nothing to lose by interrogating defendants without obtaining a valid waiver. Suppression is necessary to exhibit to the police the fact of judicial disapproval and makes constitutional rights credible to the police.

Moreover, doubt as to the effectiveness of the Fourth Amendment exclusionary rule in deterring illegal police activity is not applicable to Fifth and Sixth Amendment violations.

Additionally, the good faith factor is not applicable to the case at bar. Alternatively, sound policy reasons argue against the use of a good faith defense in situations like the case at bar. A good faith defense puts a premium on ignorance and would lead to an

exceptionally difficult fact finding process. Additionally, it would generate uncertainty, thereby defeating a primary goal of *Miranda*.

Further, the concept of judicial integrity requires suppression. The allowance into evidence of the fruits of the illegal interrogation would encourage the police to violate the constitution.

Finally, the nature of our adversary system and the importance of the dignity and integrity of the individual require affirmance of the decision of the court below.

ARGUMENT

POINT 1

THE DECISION OF THE SUPREME JUDICIAL COURT OF MASSACHUSETTS LACKS FINALITY AND IS NOT A FINAL JUDGMENT UNDER 28 U.S.C. SECTION 1257(3).

It is settled that the Supreme Court of the United States has appellate jurisdiction of state litigation "only after the highest state court in which judgment could be had has rendered a (f)inal judgment or decree". *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 476-477 (1975).

Respondent contends that since he is subject to further proceedings in Massachusetts, including a new trial, the Supreme Judicial Court's decision is not "final".

It is submitted that the denial of the motion to dismiss for lack of finality in *California v. Stewart*, 384 U.S. 436, 498 n. 71 (1966), did not create an unvarying rule that all decisions of a state's highest court concerning a motion to suppress evidence are final for purposes of jurisdiction under 28 U.S.C. section 1257(3). See, e.g., *Cohen v. New York*, 385 U.S. 976 (1966).

Further, respondent contends that this Court's limitation in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 547 (1949) that "we do not mean that every order fixing security is subject to appeal; (h)ere it is the right to security that presents a *serious and unsettled question*," (emphasis supplied) is applicable to the case at bar.

POINT 2

SINCE THE DECISION OF THE SUPREME JUDICIAL COURT OF MASSACHUSETTS MAY BE BASED ON AN ADEQUATE AND INDEPENDENT STATE GROUND, THIS HONORABLE COURT SHOULD EITHER DISMISS THE OF CERTIORARI AS IMPROVIDENTLY GRANTED OR REMAND THE CASE TO THE SUPREME JUDICIAL COURT TO CLARIFY THE BASIS OF ITS DECISION.

It is established that the United States Supreme Court "will not review judgments of state courts that rest adequate and independent state grounds". *Herb v. Pitcairn*, 324 U.S. 117, 125 (1944). Respondent

contends that the decision of the Supreme Judicial Court of Massachusetts is unclear as to whether it was based on interpretation of the Constitution of the United States or the Constitution of the Commonwealth of Massachusetts or both.

The respondent, in his Motion to Suppress Evidence, (A. 18-19) alleged violations of his rights against self-incrimination and counsel contained in both the Constitution of the United States and Part 1, Article XII of the Constitution of Massachusetts.[2]

In its decision in the case at bar, the Supreme Judicial Court relied on two Massachusetts Supreme Judicial Court opinions in concluding that the respondent's statement could not be used to establish probable cause for the issuance of a search warrant. The Supreme Judicial Court cited *Commonwealth v. Hall*, 366 Mass. 790, 795 (1975) as holding that "evidence obtained in violation of constitutional guarantees against illegal search and seizure may not be considered in determining whether there was probable cause to obtain a warrant (A. 78) and *Commonwealth v. Haas* ____ Mass. ____ Mass. Adv. Sh. (1977) 2212, 369 N.E.2d 692 as holding that "evidence obtained in violation of the principles laid down in *Miranda v. Arizona*, may not be considered in determining whether there is probable cause to make an arrest and thus validate a search made incident to an arrest". (A. 78)

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[2]Part 1, Article XII of the Constitution of Massachusetts states in relevant part: "No subject shall . . . . be compelled to accuse, or furnish evidence against himself. And every subject shall have a right to . . . . . be fully heard in his defence by himself, or his counsel, at his election. . . . ."

The Supreme Judicial Court went on to state that:

> "From these cases it follows that neither may such statements be used for the purpose of considering whether there was probable cause to obtain a search warrant. . . . Although this exact issue has not been determined by the Supreme Court, but cf. Michigan v. Tucker, 417 U.S. 433 (1974), we believe that *Haas* controls the issue *in this Commonwealth*". *Commonwealth v. White*, supra at 2812-2813, (A. 78) (emphasis supplied).

The case at bar is not one in which the Supreme Judicial Court reluctantly applied federal constitutional law. The Supreme Judicial Court reversed the convictions because "to hold otherwise would, in effect, sanction the initial violations of constitutional guarantees which the judge found took place in the police barracks" *Commonwealth v. White* supra at 2812, (A. 78).

This reasoning indicates that the Supreme Judicial Court came to an independent conclusion that failure to suppress the contraband and money would encourage police misconduct and sanction violation of the respondent's rights to counsel and his privilege against self-incrimination. As Mr. Justice Marshall has stated:

> "This is precisely the setting in which it seems most likely that the state court would apply the State's self-incrimination clause (or right to counsel) to lessen what it perceives as an intolerable risk of abuse". *Oregon v. Hass*, 420 U.S. 714, 729 (1975) (dissenting opinion of Marshall, J.)

In regard, *Commonwealth v. Romberger*, 464 Pa. 488, 347 A.2d 460 (1975) is instructive. In an earlier

decision, the Pennsylvania Supreme Court had reversed Romberger's conviction holding inadmissible statements elicited from the defendant without his being advised of his right to appointed counsel if he was indigent. *Commonwealth v. Romberger*, 454 Pa. 279, 312 A.2d 353 (1973). The Commonwealth of Pennsylvania petitioned this Court for a writ of certiorari which was granted. By order of June 17, 1974, 417 U.S. 964, the United States Supreme Court vacated the order of the Pennsylvania Supreme Court and remanded in view of the decision in *Michigan v. Tucker*, 417 U.S. 433 (1974).

After rehearing, the Pennsylvania Supreme Court reaffirmed its earlier decision holding that the statements must be excluded under both the Fifth Amendment of the Constitution of the United States and Article 1 section 9 of the Constitution of Pennsylvania which mandates that a defendant be apprised of his right to free counsel if he is unable to otherwise secure one. The Pennsylvania Supreme Court concluded that:

> "(E)ven if Tucker, supra has relaxed the requirement for the imposition of the rule of exclusion for this type of Miranda violation, in absence of a record showing that the defendant was aware of this right, the Commonwealth has failed to meet its burden to demonstrate that the waiver of this State right was knowingly made". 347 A.2d at 464.

Respondent submits that this Court should "choose the interpretation (of the decision of the Massachusetts Supreme Judicial Court) which does not face (the Court) with a constitutional question". *Black v. Cutter Labs*, 351 U.S. 292, 299 (1956) and dismiss the writ of certiorari as improvidently granted.

Alternatively, respondent respectfully suggests that "consistent with the respect due the highest courts of states of the Union that they be asked rather than told what they have intended", *Herb v. Pitcairn*, 324 U.S. 117, 128 (1945), that this Court remand the case to the Supreme Judicial Court of Massachusetts to determine the basis of its decision.[3]

POINT 3

THE QUESTIONING OF THE RESPONDENT UNDER THE CIRCUMSTANCES OF THE CASE AT BAR VIOLATED HIS FIFTH AMENDMENT RIGHTS.

Miranda v. Arizona, supra, was the first case to declare that the privilege against self-incrimination applied to state police interrogation techniques.

In each of the four companion cases involved in *Miranda*, the defendants had been arrested, questioned

[3]See e.g. *People v. Krivda*, 12 Cal. App. 3d 963, 91 Cal. Rptr. 219 (1970), aff'd, 5 Cal. 3d 357, 486 P.2d 1262, 96 Cal. Rptr. 62 (1971) (en banc), cert. granted, 405 U.S. 1039, vacated and remanded for clarification sub. nom. *California v. Krivda*, 409 U.S. 33 (1972) (per curiam), aff'd on rehearing, 8 Cal. 2d 623, 504 P.2d 457, 105 Cal. Rptr. 521 (per curiam) cert. denied, 412 U.S. 919 (1973) where this Court after granting certiorari remanded the case to the California Supreme Court to determine whether the California court had based its decision of the Fourth Amendment to the United States Constitution or upon the equivalent provisions of the California Constitution or both. The Supreme Court of California held that it had "relied upon both the Fourth Amendment to the United States Constitution and Art. I section 19 of the California Constitution, and that accordingly the latter provision furnished an independent ground to support the result . . . . . reached in the opinion". 8 Cal. 3d 623, 624, 504 P.2d 457, 105 Cal. Rptr. 521 (1973).

at a police station without full warnings of constitutional rights and confessions were obtained. These confessions were used at trial to gain convictions.

The Court conceded that the confessions might not "have been involuntary in traditional terms" 384 U.S. at 457, but concluded that to offset the compulsion inherent in custodial interrogation, safeguards were needed to make certain that the defendant has a "full opportunity to exercise the privilege against self-incrimination". 384 U.S. 457.

The Court went on to hold that the prosecution in a criminal case may not use statements the result of custodial interrogation unless it demonstrated the use of procedural safeguards to protect the privilege against self-incrimination. The Court stated that:

> "Prior to any questioning, the person must be warned that he has a right to remain silent, that any statements he does make may be used as evidence against him and that he has a right to the presence of an attorney, either retained or appointed". 384 U.S. at 444.

Additionally, the Court held that the defendant may waive these rights, provided that the waiver was made voluntarily, knowingly and intelligently. 384 U.S. at 444.

Further, the Court stated that if the defendant indicates in any manner at any time prior to or during questioning that he wishes to remain silent or that he wants an attorney, the interrogation must cease. 384 U.S. at 444-45.

Respondent contends that the questioning of the respondent absent a valid waiver, violated both the

principles enunciated in *Miranda* and the Fifth Amendment. In the case at bar, both the Superior Court judge and the Supreme Judicial Court found that the Commonwealth had not demonstrated that the respondent had knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel. (A. 62-63, 76-78).

Additionally, both found that the defendant had "affirmatively demonstrated a desire for the assistance of counsel and had at no time indicated . . . . . he had changed his mind in that regard". (A. 62-63, 77). It was further found that the state trooper did not regard the defendant as having his right to silence or his right to counsel. (A. 63, 77).

It is therefore clear that the trooper's questioning violated a mandate of Miranda that "if the defendant indicated in any manner at any time prior to or during questioning that he wishes to remain silent or that he wants an attorney, the interrogation must cease". *Miranda* supra at 444-45.

Respondent respectfully suggests that the questioning in the case at bar violated the respondent's Fifth Amendment rights for as Chief Justice Warren stated: "(t)he requirement of warnings and waiver of rights is a fundamental with respect to the Fifth Amendment privilege". *Miranda* supra at 476.

Additionally, this Court in Miranda stated that the decision was meant to "give concrete *constitutional* (emphasis supplied) guidelines for law enforcement agencies and courts to follow". Miranda supra at 441-42.

Moreover, this Court in *Orozco v. Texas*, 394 U.S. 324 (1969), in ruling a statement inadmissible because

obtained in violation of Miranda, stated that "the use of these admissions in the absence of the required warnings was a flat violation of the Self-Incrimination Clause of the Fifth Amendment". 394 U.S. at 326.

It is conceded that the Miranda warnings and waiver procedure was not the only possible "solution for the inherent compulsions of the interrogation process" *Miranda* supra at 467, but it is contended that the Fifth Amendment requires that they must be observed at least until "other procedures which are at least as effective in apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise it" *Miranda* supra at 467, are demonstrated.

Additionally, it is well established that this Court has no supervisory power over state courts. "The Court is not free to prescribe preferred modes of interrogation absent a constitutional basis". *Michigan v. Tucker* supra at 462 (dissenting opinion of Douglas, J.)

Therefore, respondent submits that at least the Miranda requirement of a knowing and intelligent waiver must be constitutionally mandated and the questioning of the respondent without a valid waiver violated the Fifth Amendment.

Moreover, it is submitted that *Michigan v. Tucker*, 417 U.S. 433 (1974) is not applicable to the case at bar. In *Tucker*, this Court held admissible the testimony of a witness whom the police discovered as a result of a defendant's statement which was obtained by the police without the defendant being advised that he had a right to free counsel if he could not afford representation. The Court found that the police conduct violated only the prophylactic rules developed by *Miranda* and not the constitutional provision against self-incrimination.

Tucker is distinguishable from the case at bar on several grounds. In *Tucker*, the questioning of the defendant took place before the *Miranda* decision, *Tucker* supra at 435, while in the case at bar, the questioning occurred many years after *Miranda*. (A. 73). Indeed, this Court in *Tucker* stated that "we consider it significant to our decision in this case that the officer's failure to advise respondent of his right to appointed counsel occurred prior to the decision in Miranda". *Tucker* supra at 447.

Additionally, the defendant in *Tucker* did not accuse himself, *Tucker* supra at 449, while the statement in the case at bar was accusatory.

Further, as this Court stated in *Tucker*:

> "The record is also clear that respondent was asked whether he wanted an attorney and that he replied that he did not. Thus, his statement could hardly be termed involuntary as that term has been defined in the decisions of this Court". *Tucker* supra at 444-45.

This stands in marked contrast to the findings of the Superior Court judge and adopted by the Supreme Judicial Court in the case at bar that the respondent:

> ". . . (H)ad affirmatively demonstrated a desire for the assistance of counsel and had placed at least two telephone calls in an attempt to obtain such assistance. Although his attempts were unsuccessful . . . . . he at no time indicated that he intended to abandon his efforts or that he had changed his mind with regard to that objective. Furthermore, it is apparent from Trooper Taliaferro's reaction that the officer did not regard the defendant as having waived his right to silence or his right to counsel" (A. 63, 77).

Additionally, respondent contends that unlike *Tucker*, his statement was involuntary and therefore obtained in violation of his right not to be compelled to self-incriminate himself. At the hearing on the Motion to Suppress, (A. 22-55), the following questions were asked by the respondent's attorney, Mr. Silverman and the answers are those of Trooper Taliaferro.)

> Q. Was the phone call made at that time after the search of the defendant?
> A. I really don't recall; so many attempts, I really don't recall whether this particular one was after, before, or-
> Q. Other attempts unsuccessful because Mr. White physically unable to use the phone?
> A. In the beginning he was able to some extent. Apparently he tried calling home, tried calling various places. A little later he just was physically—couldn't do anything, he was starting to bounce off the walls. At that point I decided he was through with phone—unable to make them then, I placed in the cell.
> Q. —the phone call he had conversation with?
> A. I cannot recall.
> Q. Was that at the same time?
> A. As I placed him in the cell? No, previous to being placed in the cell.
> Q. At some point you decided he could not make phone calls?
> A. He was proceeding to climb the walls and bounce around and didn't know what he was doing. At this point he was placed in the cell.
> Q. Was that after conversation?

A. Definitely after he had conversation with one attorney apparently trying to contact other attorneys.
Q. Can you describe his condition at the time—appeared to be under the influence?
A. Most certainly did appear to be under the influence and some narcotic. His eyes were watery and just—he didn't have too much control over him. He was scratching all night long and some statements incoherent.
Q. Breathalyzer reading .13?
A. That is correct.
Q. Which is not necessarily enough to make someone bounce off the walls?
A. No, it is not.
Q. Your conclusion he may have been under the influence of something else?
A. I came to that conclusion before the results—the breath test. (A. 48-49).

It is clear that the Supreme Judicial Court gave credence to this testimony by its findings that the defendant "bounce(d) around, climb(ed) the walls, was scratching himself in an unusual way and "didn't know what he was doing" (A. 74).

Additionally, the respondent had taken a breathalyzer test with a result of thirteen one hundredths percentage by weight of alcohol in his blood. (A. 61). The result of this test created a statutory presumption that the respondent was under the influence of intoxicating liquor pursuant to Massachusetts General Laws chapter 90 section 24(1)(e).

Finally, it was established that the respondent had difficulty trying to use the telephone and dropped coins

on the floor several times while attempting to do so. (A. 61, 74).

It is submitted that these facts lead to the conclusion that the respondent's statement was involuntary in a Fifth Amendment sense. As one commentator, in discussing voluntariness under the Fifth Amendment has stated:

> "In contrast to due process, the self-incrimination clause establishes a privilege of silence that is broader than fundamental fairness, one that seeks to insure a meaningful standard of voluntariness in obtaining statements rather than merely control over forms of coercion. The significance of the distinction lies in the fact that voluntariness and coercion are not necessarily opposite sides of the same coin. Some "involuntary" statements are clearly the product of physical or psychological force. But the Court's movement to a free will standard in the progression of coerced confessions cases was meant to signify its rejection of subtle police methods to secure statements, even when not overtly compelled.". Burger, *"Unprivileged Status of the Fifth Amendment"*, 15 Am. Crim. L. Rev. 191, 202-203 (1978).

This free will standard is exemplified in the pre-Miranda decision of *Townsend v. Sain*, 372 U.S. 293 (1963) where this Court stated that "any questioning by police officers which in fact produces a confession which is not the product of a free intellect renders the confession inadmissible". 372 U.S. at 306.

It is contended that the respondent's condition at the time of questioning precluded his making a statement which would be the product of a free intellect and was therefore involuntary under standards applicable both before and after the *Miranda* decision.

POINT 4

THE EVIDENCE OBTAINED FROM THE RESPONDENT'S AUTOMOBILE MUST BE SUPPRESSED BECAUSE IT WAS OBTAINED AS THE RESULT OF A VIOLATION OF THE FIFTH AMENDMENT.

Respondent contends that the decision of the Supreme Judicial Court, requiring exclusion of the evidence obtained from the trunk of the respondent's automobile was correct in that the admission of said evidence would violate *Miranda*, the Fifth Amendment and the rationale of the "fruit of the poisonous tree" doctrine.

This Court, in *Miranda*, addressed itself to the issue of the admissability of evidence derived from an illegally obtained statement by stating: "But unless and until such warnings and waiver are demonstrated by prosecutor at trial, no evidence obtained as a result of interrogation can be used against him." *Miranda* supra at 479.

Further, Justice Clark, in his dissenting opinion, explained the effect of the majority's decision by stating that "(t)he Court further holds that failure to follow the new procedure requires inexorably the exclusion of any statement by the accused, as well as the fruits thereof" *Miranda* supra at 500.

Indeed, the National District Attorneys Association has opened that Miranda mandates suppression of evidence obtained as a result of an illegally obtained statement by stating:

> "It has come to my attention that there are some who would argue that while a statement or confession is inadmissible under the Miranda doctrine, nevertheless, that evidence obtained by virtue of the statement (e.g. "The gun I used is located under the sycamore tree".) would be admissible. Obviously, this would be the fruit of the poisonous tree and inadmissibie as is evidence obtained after an illegal arrest or as a result of illegal wiretapping, and as is a confession obtained after an illegal arrest. . . . even if otherwise they would be admissible . . . To argue differently would destroy the whole basis for the rule in the first instance." Nedrud, 2 Journal of the National District Attorneys Association Foundation, 114 (1966).

Thus, most courts have held inadmissible, evidence derived from a Miranda violation. See e.g. *United States v. Castellana* 488 F.2d 65 (5th Cir. 1974) reversed on other grounds, 500 F.2d 325; *United States v. Harrison*, 265 F.Supp. 660 (S.D. N.Y. 1967); *United States v. Pellegrini*, 309 F.Supp. (S.D. N.Y. 1970); *People v. Paulen*, 308 N.Y.S. 2d 883 (3rd Dep't 1969); *People v. Schader*, 71 Cal. 2d 761, 457 P.2d 841 (1969) (en banc); *People v. Algien*, 501 P.2d 468 (Colo. 1972) (en banc). Contra, *Keister v. Cox*, 307 F.Supp. 1173 (W.D. Va. 1969).

Moreover, it is submitted that:

> "(I)f the police were permitted to utilize illegally obtained confession for links and leads rather than being required to gather evidence independently, than the Miranda warnings would be of no value in protecting the privilege against self-incrimination. The requirement of warning (and waiver) would be meaningless, for the police would be permitted to

accomplish indirectly what they could not accomplish directly and there would exist no incentive to warn". Pitler, *"The Fruit of the Poisonous Tree Revisited and Shepardized"*, 56 Cal. L. Rev. 579, 620 (1968).

Additionally, the Fifth Amendment by its own terms requires suppression in the case at bar. The Fifth Amendment's Privilege against Self-Incrimination's primary goal is to protect an individual "against being compelled to furnish evidence to convict him of a criminal charge". *Brown v. Walker*, 161 U.S. 591, 605-606 (1896).

Unlike the Fourth Amendment, the Fifth Amendment is directly concerned with the introduction of tainted evidence at trial. This Court recently made referenee to this destinction by stating that "(i)n contrast to the Fifth Amendment's direct command against the admission of compelled testimony, the issue of admissibility of evidence obtained in violation of the Fourth Amendment is determined after and apart from the violation". *United States v. Janis*, 428 U.S. 433, 443 (1976)[4]

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[4]Respondent suggests that the reasoning of *United States v. Calandra* 414 U.S. 338 (1974); *United States v. Peltier*, 422 U.S. 531 (1975); and *United States v. Janis*, 428 U.S. 433 (1976) is not applicable to the case at bar. These cases dealt with the Fourth Amendment's exclusionary rule which is a judicially created remedy. The object of the exclusionary rule in the Fourth Amendment cases is to deter future unconstitutional police conduct, (See, e.g. *Elkins v. United States*, 364 U.S. 206, 217 (1960)), and the "application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served". *United States v. Calandra*, supra at 348.

In contrast, the primary purpose of the Fifth Amendment's Privilege against Self-Incrimination as previously noted is protecting the individual against being compelled to furnish evidence to convict

(continued)

This Court has consistently held that the Fifth Amendment requires that evidence derived from compelled testimony is not admissible. In *Murphy v. Waterfront Commission*, 378 U.S. 52, (1964) this Court held that "a state witness may not be compelled to give testimony which may be incriminating under federal law unless the compelled testimony and its fruits cannot be used in any manner . . ." 378 U.S. 79.

More recently, this Court has stated that "unless immunity is conferred, however, testimony may be suppressed, along with its fruits, if it is compelled over an appropriate claim of privilege." *United States v. Mandujano*, 425 U.S. 564, 576 (1976).

Kastigar v. United States, 406 U.S. 441 (1972), is also relevant to the case at bar. In Kastigar, this Court was concerned with the scope of immunity necessary to protect the Privilege Against Self-Incrimination. The Court found that the federal use-immunity statute, 18 U.S.C. section 6002 was constitutional in that it ". . . . provides a comprehensive safeguard, barring use of

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(footnote continued from preceding page)
him of a criminal charge. The deterrence rationale is not applicable to Fifth Amendment violations because unlike the Fourth Amendment, the Fifth Amendment is directly concerned with the introduction of tainted evidence at trial. When an individual makes a statement that is the result of illegal questioning, his privilege against self-incrimination is not violated; it is violated when the tainted evidence is used against him at trial. Thus, prohibiting the use of fruits of illegally obtained statements to be introduced at trial prevents a violation of the privilege and "even if the exclusion of evidence derived from a coerced confession is unlikely to have a deterrent effect on the police, its introduction will still represent an infringement on the individual's privilege against self-incrimination". Comment, 82 Yale L.J. 171, 178 (1972). See e.g. Ritchie, *"Compulsion that Violates the Fifth Amendment: The Burger Court's Definition"*, 61 Minn. L. Rev. 383, 417 n. 168.

compelled testimony as an investigatory lead". *Kastigar* supra at 460.

The Court went on to rule that a grant of immunity ". . . prohibits the prosecutorial authorities from using the compelled testimony *in any respect*". 406 U.S. at 453 (emphasis in original).

The respondent respectfully suggests that the Fifth Amendment interests involved in *Kastigar* are equivalent to those interests in the case at bar. Indeed, the Court, in *Kastigar* in reaching its decision drew an analogy to the use of an exclusionary rule in coerced confession cases. 406 U.S. at 461-62.

People v. Robinson, 48 Mich. App. 253, 210 N.W. 2d 372 (Mich. Ct. App. 1973) is also instructive. In *Robinson*, the defendant sought to suppress evidence derived from an involuntary confession claiming it was the fruit of the poisonous tree. The Michigan Court of Appeals, in allowing suppression, declared the fruit of the poisonous tree theory was an "intrinsic part of the Fifth Amendment" *Robinson* supra at 256, 210 N.W. 2d at 374. The court went on to state that:

> "Instead of urging us to establish a Fifth Amendment branch of the fruit of the poisonous tree doctrine, (the defendant) should have been arguing that such a branch was always present as an essential element of the Fifth Amendment guarantee". *Robinson* supra at 259-60, 210 N.W. 2d at 376.

The court in *Robinson*, after citing *Kastigar* and *Murphy v. Waterfront Commission*, supra, analogized the immunity cases to the case involving involuntary

statements. One commentator has suggested that such an analogy is correct because:

> "Exclusion of both primary and secondary evidence discovered through testimony compelled by grant of immunity serves as a substitute for the right of the individual to remain silent. Similarly, where illegal police conduct coerces the defendant to incriminate himself in derogation of the privilege, a bar to the use of such information reinstates the parties to their respective positions prior to the objectionable conduct, and restores the protection of the privilege to the accused". Note, 41 Brooklyn L. Rev. 325, 338 (1974).

Respondent contends that the Supreme Judicial Court's decision suppressing the contraband and currency found in the trunk of the automobile was correct in that it attempts to put the respondent in the position he was prior to the illegal questioning and upholds the protection of the Fifth Amendment.

Alternatively, respondent suggests that the Fourth Amendment fruit of the poisonous tree doctrine mandates suppression of the controlled substances and currency seized from the automobile.

The genesis of this Fourth Amendment doctrine was advanced in *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920). In *Silverthorne*, federal officers unlawfully seized certain documents belonging to the Silverthornes and presented them to a grand jury which had already indicted them and their company. A district court ordered the return of the documents, but impounded photographs of the originals. The prosecutor then caused the grand jury to issue subpoenas to the defendants to produce the originals

and their refusal led to a contempt citation. In holding that the subpoenas were invalid because based on knowledge obtained from illegally seized evidence, Justice Holmes noted that:

> "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used all" 251 U.S. at 392.

The issue was thoroughly explored in *Wong Sun v. United States*, 371 U.S. 471 (1963). There, one Toy had made statements to federal agents and the statements were held inadmissible against him because they resulted from an illegal arrest. The statement led the agents to Yee. At Yee's home, the agents found narcotics which were introduced at trial against Toy.

This Court reversed Toy's conviction and held that the narcotics discovered at Yee's home must be excluded just as Toy's statements which led to that discovery. The Court stated that the test was "whether granting establishment of the primary illegality, the evidence . . . has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." 371 U.S. at 488.

Respondent contends that the rationale of *Silverthorne*, supra is applicable to the case at bar. In *Silverthorne*, the subpoenas were invalid because based on knowledge illegally obtained, while in the case at bar, the search warrant was held invalid because it was based on an illegally obtained statement. The only difference is that in Silverthorne the original illegality involved violation of the Fourth Amendment while in the case at bar, the Fifth Amendment was violated.

The United States Fifth Circuit Court of Appeals applied the Wong Sun doctrine to violations if Miranda in *United States v. Castellana*, 488 F.2d 65 (5th Cir. 1974), reversed on other grounds, 500 F.2d 325. In *Castellana*, an agent of the Federal Bureau of Investigation, in executing a search warrant, abruptly asked the defendant if he had any weapons within reach. The defendant replied, "yes down there" indicating the lower desk drawer. The agent found four handguns and asked Castellana where he got them. The defendant stated he had taken them on loan.

The Fifth Circuit concluded that the statements had been illegally elicited and the handguns were the product of the illegal interrogation and ordered both the statements and handguns be suppressed. The court stated that "in *Wong Sun* terms, the guns were come at by exploitation of an illegality, improper interrogation". *Castellana* supra at 68.

Additionally, the Maryland Court of Special Appeals in applying *Wong Sun* to situations involving the Fifth Amendment has stated:

> "In the instant case we do not have an official action pursued in complete good faith with the confessions rendered inadmissible by the mere inadvertent omission of one of the prophylactic Miranda warnings. We have the confession being obtained in the absence of an effective waiver of the constitutional rights relating to self-incrimination and assistance of counsel to which appellant was entitled. The rationale of the holdings in *Harris* and *Tucker* does not apply to make admissible the tangible evidence obtained here, any more than it would apply to make admissible evidence derived from a confession not voluntary

in the traditional sense". In Re Appeal No. 245, 349 A.2d 434, 445 (Md. Ct. of Special Appeals) (1975).

Similarly, the defendant's statement in the case at bar was not the result of an inadvertent omission of a prophylactic Miranda warning. It was the result of the willful questioning[5] of a defendant who "had affirmatively demonstrated a desire for the assistance of counsel and had placed at least two telephone calls in an attempt to secure such assistance, (A. 63, 77); had been "bouncing off the walls" (A. 63, 74) and was statutorily presumed to be intoxicated (A. 63, 74). This is a case where an admission was obtained by intentional questioning without a valid waiver.

POINT 5

THE EVIDENCE SEIZED FROM THE RESPONDENT'S AUTOMOBILE MUST BE SUPPRESSED AS THE RESULT OF A VIOLATION OF THE RESPONDENT'S SIXTH AMENDMENT RIGHT TO COUNSEL.

Both the Superior Court judge and the Supreme Judicial Court found that the respondent had placed at least two telephone calls in an attempt to obtain legal representation (A. 63, 74); had "affirmatively demonstrated a desire for the assistance of counsel"and had "at

[5]The Superior Court judge and the Supreme Judicial Court found that the state trooper did not regard the defendant as having waived his right to silence or his right to counsel. (A. 63, 77).

no time indicated . . . he had changed his mind in that regard" (A. 63, 77). Additionally, it was found that the "State trooper did not regard the defendant as having waived his right to silence or his right to counsel" (A. 63, 77).

The Supreme Judicial Court found that "on those facts alone it would be a difficult task for the Commonwealth to establish that the defendant had waived his right to counsel". *Commonwealth v. White* supra at 2811, (A. 77).

Respondent contends that questioning under the circumstances of the case at bar violated the respondent's Sixth Amendment right to counsel and that any evidence derived from the illegal interrogation must be suppressed. See e.g. *Escobedo v. Illinois*, 378 U.S. 478 (1964) and *Brewer v. Williams*, 430 U.S. 387 (1977).

POINT 6

SINCE THE ILLEGALLY OBTAINED STATEMENT WAS A CRITICAL ELEMENT OF THE AFFIDAVIT IN SUPPORT OF THE SEARCH WARRANT, THE MONEY AND CONTRABAND SEIZED PURSUANT TO THE SEARCH WARRANT MUST BE SUPPRESSED.

The Superior Court judge and the Supreme Judicial Court agreed that the existence of probable cause to support the search warrant "unquestionably depended upon the statement of the defendant, quoted in the affidavit, that the car did contain such contraband" (A. 64, 79).

In *United States v. Giordano*, 416 U.S. 505 (1974) this Court held that evidence secured as a result of a court approved pen register whose application referred to logs of illegally monitored conversations, must be suppressed. The Court stated in footnote that "(i)n these circumstances, it appears to us that the illegally monitored conversations should be considered a critical element in extending the pen register authority". *Giordano* supra, at 534 n. 19.

Respondent respectfully suggests that the illegally obtained statement was a critical element in the affidavit in support of the search warrant and therefore fatally infected the warrant.

Moreover, it is submitted that the standard of the dissenting justices in *Giordano* has been met in the case at bar. Justice Powell, dissenting in *Giordano*, stated:

> ". . . (T)he inclusion in an affidavit of indisputably tainted allegations does not necessarily render the resulting warrant invalid. The ultimate inquiry on a motion to suppress evidence seized pursuant to a warrant is not whether the underlying affidavit contained allegations based on illegally obtained evidence but whether putting aside all tainted allegations, the independent and lawful information stated in the affidavit suffices to show probable cause. *Giordano* supra at 555.

Since the Supreme Judicial Court determined that the application for the search warrant, considered without the tainted evidence, was insufficient to establish probable cause, (A. 79), it is contended that evidence secured as a result of the execution of the search warrant must be suppressed.

POINT 7

EVEN IF THE QUESTIONING OF THE RESPONDENT VIOLATED ONLY THE PROPHYLACTIC SAFEGUARDS OF MIRANDA V. ARIZONA, THE DECISION OF THE SUPREME JUDICIAL COURT SHOULD BE AFFIRMED.

As previously noted, Respondent contends that the questioning of the respondent in the circumstances of the case at bar violated *Miranda*, the Fifth Amendment and the Sixth Amendment.

However, assuming arguendo, that this Court rules that only the *Miranda* prophylactic safeguards and not the Fifth or Sixth Amendments were violated, the respondent suggests that the decision of the Supreme Judicial Court was correct.

As previously noted, *Michigan v. Tucker*, supra, differs from the case at bar in that *Tucker* involved an interrogation which took place before Miranda and involved the failure to give the required warning that the defendant would be furnished counsel free. *Tucker* supra at 436. Additionally, the defendant in *Tucker* did not accuse himself, 417 U.S. at 449, and when asked whether he wanted an attorney, he replied that he did not. 417 U.S. at 445.

In contrast, the case at bar is a post Miranda interrogation involving a defendant who was incapable of waiving his right against self-incrimination and right to counsel and the defendant's statement was accusatory. Additionally, the defendant affirmatively exhibited a desire for counsel and the police officer did not regard the defendant as having waived his rights to silence or counsel. (A. 63, 74, 77).

This Court in *Tucker*, after concluding that the actions of the police had not violated the Fifth Amendment and that *Wong Sun*, supra, was not applicable, went on to decide the issue as a "question of principle" Tucker supra at 446. The Court proceeded to balance the interests of the government of making available to the trier of fact all relevant evidence with the need to provide an effective sanction to uphold constitutional rights. Justice Rehnquist determined that the prime purpose of the Fourth Amendment exclusionary rule was the deterrence of future unlawful police conduct and went on to state that "(i)n a proper case this rationale would seem applicable to the Fifth Amendment context as well". Tucker supra at 447.

The Court in Tucker, after balancing the interests involved, concluded that testimony of a third party witness secured as a result of the defendant's statement was admissible.

Respondent respectfully suggests that the government's interest in using the evidence secured from the respondent's automobile is outweighed by the need to deter illegal police conduct, the requirement of judicial integrity and considerations of our accusatory system of justice.

The theory underlying the Fourth Amendment exclusionary rule is that barring the use of illegally obtained evidence will remove the incentive for the police to violate the law. See e.g. *Mapp v. Ohio*, 367 U.S. 643 (1961).

It is submitted that the allowance of the introduction into evidence of the contraband and money seized in the case at bar would encourage the police to violate the law. The police would have everything to gain and

nothing to lose by questioning defendants without a valid waiver of constitutional rights. The suppression of the respondent's statement alone would not create sufficient deterrence because the police, knowing that the statement may lead to other evidence, would have an inducement to violate the law.

Further, the exclusionary rule is aimed at deterring future illegal conduct by the police generally. In order to accomplish this deterrence, it is necessary to effectively communicate the rule to police officers. To date, it has been clearly stated to the police that they cannot gain by violating rights of defendants. The carving out of exceptions to this rule would cloud this clear command. See e.g. Oaks, *"Studying the Exclusionary Rule in Search and Seizure,"* 37 U. Chi. L. Rev. 665, 710-711 (1970).

Professor Oaks has also pointed out that sanctions have other long range effects that help the police conform to the law. One important aspect of this is the moral or educative influence of the law.

> "The existence and imposition of a sanction reenforces the rule and underlines the importance of observing it. The principle is directly applicable to the exclusionary rule. . . . As a visible expression of social disapproval for the violation of . . . . guarantees, the exclusionary rule makes the guarantees . . . credible. Its example teaches the importance attached to observing them. Ibid at 711.

Respondent suggests that the decision of the Supreme Judicial Court in refusing "to sanction the initial violations of constitutional guarantees which . . . took place in the police barracks, *Commonwealth v.*

White, supra at 2812, (A. 78), exhibits judicial disapproval and makes constitutional rights credible to police officers.

Further, it is submitted that the doubt as to whether the Fourth Amendment exclusionary rule in fact does deter, *United States v. Janis*, 428 U.S. 433, 449-454 (1976) is not applicable to the Fifth and Sixth Amendment violations of the case at bat. As Professor Oaks has stated:

> " . . . (T)he predominant incentive for interrogation is to obtain evidence for use in court. Consequently, police conduct in this area is likely to be responsive to judicial rules governing the admissibility of that evidence" Oaks supra at 665.

Other studies have also indicated that *Miranda* has had success in upholding Fifth Amendment rights. See e.g. Robinson, *"Police and Prosecutor Practices and Attitudes Relating to Interrogation as Revealed by Pre- and Post-Miranda Questionnaires: A Construct of Police Capacity to Comply"*, 1968 Duke L.J. 425, 481-92; Project, *"Interrogations in New Haven: The Impact of Miranda"*, 76 Yale L.J. 1519, 1615-16 (1967).

Moreover, it is suggested that the good faith factor mentioned in *Michigan v. Tucker* supra at 447, is not applicable to the case at bar. *Tucker* was pre-Miranda interrogation and the police officers were guided by the right to counsel during interrogation mandate of *Escobedo v. Illinois*, supra. In *Tucker*, "the police asked respondent if he wanted counsel,and he answered that he did not". *Tucker* supra at 447.

In contrast, the case at bar is post-Miranda, the respondent repeatedly attempted to secure counsel and never indicated that he intended to abandon his effort.

(A. 63). Additionally, the State trooper questioned the respondent knowing that the respondent had not waived his right to silence or counsel (A. 63, 77).

Further, it is submitted that sound policy reasons dictate against the use of a good faith factor in situations involving Miranda violations. As one commentator has stated:

> "Although the immediate impact of an application of the exclusionary rule is to penalize past police error, its longer range impact should be to induce individual police officers to learn the law governing their activities and to provide an incentive to police departments to train their employees as fully and completely as possible. Use of good faith defense undercuts this potential, for it places a premium on ignorance. Moreover, a good faith defense would add an additional and exceptionally difficult fact finding operation to the already overburdened criminal process. Except in the most unusual circumstances, determination of whether a mistake of law was "reasonable" is hardly an easy task. The existence of such a defense could generate uncertainty and invite calculated risks on the part of the police, thereby defeating a primary goal of Miranda". Stone, *"Miranda Doctrine in the Burger Court"*, 1977 The Supreme Court Review 99, 124 (1977).

Additionally, it is submitted that the concept of judicial integrity is a further basis for affirming the decision of the Supreme Judicial Court.

Mr. Justice Brandeis, in dissenting in *Olmstead v. United States*, 277 U.S. 438 (1928), stated that the introduction into evidence of illegally obtained evidence "is denied in order to maintain respect for law; in order to promote confidence in the administration of

justice; in order to preserve the judicial process from contamination" 277 U.S. at 484.

More recently, this Court has stated that "the primary meaning of judicial integrity in the context of evidentiary rules is that the courts must not commit or encourage violations of the Constitution." *United States v. Janis*, 428 U.S. 433, 458-59 n. 35 (1976). Respondent respectfully suggests that the allowance into evidence of the fruits of the illegal interrogation in the case at bar would encourage police to violate the Constitution.

It was precisely this issue that the Supreme Judicial Court was making reference to when it held that:

> "(N)either may such statements be used for the purpose of considering whether there was probable cause to obtain a search warrant. To hold otherwise would in effect sanction the initial violations of constitutional guarantees which . . . took place in the police barracks". *Commonwealth v. White* supra at 2812, (A. 78).

Finally, the respondent suggests that the nature of our accusatory system requires that the decision of the Supreme Judicial Court be affirmed. Thus, Chief Justice Warren, discussing the privilege against self-incrimination, stated that:

> ". . . (T)he Constitutional foundation underlying the privilege is the respect a government—state of federal—must accord to the dignity and integrity of its citizens. To maintain a "fair state individual balance", to require the government to "shoulder the entire load", 8 Wigmore, Evidence 317 (McNaughton rev. 1961), to respect the inviolability of the human personality, our accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth". *Miranda v. Arizona* supra at 460.

Respondent submits that the unanimous decison of the Supreme Judicial Court of Massachusetts upholds the "privilege against self-incrimination—the essential mainstay of our adversary system", *Miranda* supra at 460, and should be affirmed.

CONCLUSION

For the reasons stated above, the decision of the Supreme Judicial Court of Massachusetts should be affirmed or in the alternative, the writ of certiorari should be dismissed as improvidently granted or the case should be remanded to the Supreme Judicial Court of Massachusetts for a determination of whether their decision is based on an adequate and independent state ground.

Respectfully submitted,
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In the
Supreme Court of the United States.

OCTOBER TERM, 1978.

No. 77-1388.

COMMONWEALTH OF MASSACHUSETTS,
PETITIONER,
v.
CHARLES F. WHITE,
RESPONDENT

ON WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS.

Reply Brief of Petitioner.

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Reply Brief of Petitioner.

Argument.

I. THE DECISION OF THE SUPREME JUDICIAL COURT CONSTITUTES A FINAL JUDGMENT UNDER 28 U.S.C. § 1257(3).

In *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975), this Court set out four categories of cases in which a decision of

the highest court of a state on a federal issue had been deemed a final judgment for the purposes of 28 U.S.C. § 1257, even though further state proceedings might follow.

> "In the third category are those situations where the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case." 420 U.S. at 481.

The instant case falls within that third category. Here the federal claim, that statements and evidence seized in the absence of a knowing and intelligent waiver of rights enumerated in *Miranda* v. *Arizona*, 384 U.S. 436 (1966), must be suppressed, has been finally decided. Although the Commonwealth might theoretically proceed to retry the defendant, review of the federal issue could not be had whatever the ultimate outcome.

In *Cox*, this Court referred to *California* v. *Stewart*, 384 U.S. 436 (1966), as epitomizing this category of cases. 420 U.S. at 481. In *Stewart*, the Court denied the respondent's motion to dismiss the writ of certiorari for lack of a final judgment, stating:

> "After certiorari was granted in this case, respondent moved to dismiss on the ground that there was no final judgment from which the State could appeal since the judgment below directed that he be retried. In the event respondent was successful in obtaining an acquittal on retrial, however, under California law the State would have no appeal. Satisfied that in these circumstances the decision below constituted a final judgment under 28 U.S.C. § 1257(3) (1964 ed.), we denied the motion. 383 U.S. 903." 384 U.S. at 498 n.71.

The Commonwealth would be similarly precluded from appeal should the defendant be retried and acquitted. In addition, the decision of the Supreme Judicial Court carries with it greater finality than did the decision of the highest court of California in *Stewart*. As noted by Mr. Justice Harlan, the California Supreme Court had not finally excluded the challenged confession, but had "left the State free to show proof of a waiver." *Miranda* v. *Arizona*, 384 U.S. 436, 525 (Harlan, J., dissenting). No such further litigation of the issue is left to the Commonwealth in the instant case.

Therefore, the petitioner suggests that the requisite finality, as interpreted in *California* v. *Stewart*, is present in the instant case and that this Court has properly exercised its discretion in granting the writ in order to determine a serious question of federal law.

II. The Supreme Judicial Court did Not Base its Decision on an Adequate Independent State Ground.

A. *The Decision Below is Devoid of Reference to a State Ground for Decision.*

The decision below makes no reference to Part I, Article XII, of the Declaration of Rights, Constitution of Massachusetts. The decision below, in addition to a brief attempt to distinguish *Michigan* v. *Tucker*, 417 U.S. 433 (1974), as not controlling, does refer to two previous state court decisions; one construing the constitutional requirements of the

Fourth Amendment (*Commonwealth* v. *Hall*, 366 Mass. 790, 795 [1975]), and one construing the application of the exclusionary rule as required by *Miranda* v. *Arizona*, *supra* (*Commonwealth* v. *Haas*, ____ Mass. ____, Mass. Adv. Sh. [1977] 2212, 369 N.E. 2d 692). Neither of the referenced state decisions contains any reference to the application of Article XII of the Declaration of Rights. Indeed, the majority opinion in *Haas* clearly relies upon *Miranda* v. *Arizona*, *supra*, and *Brown* v. *Illinois*, 422 U.S. 590 (1975). *Haas*, Mass. Adv. Sh. (1977) at 2216-2225. The concurring opinion in *Haas* refers not to any state ground, but to federal standards, as requiring the decision reached in that case.

> "We are bound by decisions of the Supreme Court of the United States to hold that there was error both as to the motions to suppress and as to the improper argument of the prosecutor. . . .[T]he rulings we are required to make under *Miranda* v. *Arizona* . . . are unjust . . . ." *Haas* at 2236 (concurring opinion, Braucher, J.).

See generally *Commonwealth* v. *Dustin*, ____ Mass. ____, Mass. Adv. Sh. (1977) 2302, 368 N.E. 2d 1388.

In no case involving the application of *Miranda* has the Supreme Judicial Court based its decision on other than what it viewed as federal constitutional requirements. Indeed, in the sole case in which that court has considered the issue, it refused to hold, in a *Miranda*-related context, that Article XII of the Declaration of Rights provided greater protection to defendants than is provided by the United States Constitution. The court rejected a defendant's invitation to hold that, under Article XII, the court need not adopt this Court's decision in *Harris* v. *New York*, 401 U.S. 222 (1971), permitting the use for impeachment purposes of statements elicited in violation of

Miranda safeguards. *Commonwealth* v. *Harris*, 364 Mass. 236, 238-239 (1973).

Moreover, there is no support in Massachusetts law for the proposition that the Supreme Judicial Court would decide a case on a specific state constitutional provision without reference thereto. To the contrary, where decision has rested on an independent state ground, the court has specifically addressed the constitutional or statutory provision on which judgment is based. See generally *Commonwealth* v. *O'Neal*, ____ Mass. ____, Mass. Adv. Sh. (1975) 3502, 339 N.E. 2d 676 (death penalty is unconstitutional under Massachusetts Declaration of Rights); *Commonwealth* v. *Possehl*, 355 Mass. 575 (1969) (state and federal constitution require that a blood grouping test be provided without charge to an indigent defendant in a paternity suit); *Blaisdell* v. *Commonwealth*, ____ Mass. ____, Mass. Adv. Sh. (1977) 1307, 364 N.E. 2d 191 (constitutionality of statute providing for court-ordered psychiatric examination construed under the Fifth Amendment to the United States Constitution and Article XII of the Declaration of Rights); *Commonwealth* v. *Jones*, 362 Mass. 497 (1972) (violation of defendant's statutory right to use a telephone compels exclusion of evidence). Indeed, the respondent's most recent submission of *Board of Selectman of Framingham* v. *Municipal Court of the City of Boston*, ____ Mass. ____, Mass. Adv. Sh. (1977) 2541, 369 N.E. 2d 1145, demonstrates the court's practice of articulating the basis for its decision.

> "In the present circumstances, the protection of the privacy of the individual and the necessity for preserving confidence in the processes of government, rather than encouraging contempt for them, require that the evidence be held inadmissible. We reach this result as

matter of Massachusetts law, even though it may not be required by the Federal Constitution." 369 N.E. 2d at 1148.

B. *The Ground for the Decision Below is Not Ambiguous.*

The instant case simply does not present an ambiguity as to the ground for judgment below. Compare *California* v. *Krivda*, 409 U.S. 33 (1972), which was remanded for determination of the ground for judgment where the court below cited excerpts from an earlier decision which relied specifically upon both state and federal provisions.

Commonwealth v. *Romberger*, 464 Pa. 488, 347 A. 2d 460 (1975), also provides little support for respondent. That case was remanded not to resolve any ambiguity in the basis for the lower court's decision, but for reconsideration in light of *Michigan* v. *Tucker*, *supra*. The Pennsylvania court then applied state law. However, the speculative possibility that Massachusetts might in the future construe Article XII to be applicable to the particular circumstances of the instant case does not justify avoidance of the federal question presented in the present posture of this case.

Petitioner suggests that this Court has the authority to review the substantial federal question presented in the present posture of this case. To render that authority unavailing to the Commonwealth based upon the mere speculative suggestion that the state court *may* have based its decision on an unarticulated state ground would constitute an abdication of this Court's ultimate responsibility to decide federal constitutional law. See *Herb* v. *Pitcairn*, 324 U.S. 117, 131 (1945) (Black, J., dissenting). As the Court has stated, the mere

> "possibility that the state court might have reached the same conclusion if it had decided the question purely as a matter of state law does not create an adequate and independent state ground that relieves this Court of the necessity of considering the federal question." *United Air Lines* v. *Mahin*, 410 U.S. 623, 630-631 (1973).

See also *Oregon* v. *Hass*, 420 U.S. 714, 719-720 (1975); *Beecher* v. *Alabama*, 389 U.S. 35, 37 n.3 (1967).

III. The Statement was Not Involuntary as Contemplated by the Fifth Amendment.

The test for determining voluntariness of a confession under the Due Process Clause is whether the will of a defendant was overborne. If his will is found to have been overborne, the confession cannot be deemed to be "the product of a rational intellect and a free will." *Reck* v. *Pate*, 367 U.S. 433, 440 (1961).

In reaching this determination, all the circumstances attendant to taking the confession must be taken into account. These factors include evidence of physical abuse (*Brown* v. *Mississippi*, 297 U.S. 278 [1936]); evidence of psychological coercion or deception (*Brewer* v. *Williams*, 430 U.S. 387 [1977], *Spano* v. *New York*, 360 U.S. 315 [1959]); the length of detention (*Ashcraft* v. *Tennessee*, 322 U.S. 143 [1944]); and the amount and manner of interrogation (*Turner* v. *Pennsylvania*, 338 U.S. 62 [1949]). In the instant case, the record is devoid of any evidence of physical or psychological coercion or deception. There was no interrogation on the original charge of driving under the influence; the statement in question was the response to a single question put in response to a conversation initiated by the defendant.[1] The defendant was not held

[1] Compare *Michigan* v. *Mosley*, 423 U.S. 96 (1975), in which this Court eschewed any blanket prohibition against further interrogation of a de-

incommunicado nor was the detention for any appreciable length of time. The single factor which could be pointed to as suggestive of involuntariness is that the defendant registered a .13 reading on the breathalyzer and exhibited some motor impairment.[2]

Petitioner suggests that comparison of the circumstances and the condition of the defendant in the instant case with the circumstances which have supported a finding of involuntariness is instructive. See generally, *Culombe* v. *Connecticut*, 367 U.S. 568 (1961) (defendant found to be mentally defective); *Fikes* v. *Alabama*, 352 U.S. 191 (1957) (defendant a highly suggestible schizophrenic); *Blackburn* v. *Alabama*, 361 U.S. 199 (1960) (defendant, insane and incompetent, confessed after 8-9 hours of incommunicado interrogation).

Finally, petitioner suggests that respondent's attempt to argue that the defendant's free will was so overborne as to be comparable to the situtation presented in *Townsend* v. *Sain*, 372 U.S. 293 (1963), does not bear analysis.

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fendant, under all circumstances, after he had asserted his right to remain silent. *Id.* at 102.

[2]It should be noted that the Massachusetts legislature, on the recommendation of the Commissioner of Public Safety, lowered the presumptive level from .15 to .10 in 1972, to conform with the National Highway Safety Act of 1966, which set a .10 standard for the presumption. See *Mass. House Doc.* 152, 154 (1972). The Report of the Commissioner of Transportation submitted to Congress in 1968 enumerated the particular effects of alcohol on driving skills which justified the establishment of the presumption at .10. Those effects fell into the areas of spatial judgment, vision, coordination and the ability to concentrate on two things (such as steering and watching traffic signals) at the same time. Secretary of Transportation, *Report To The Congress, Alcohol and Highway Safety* (1968); Freeman, Brian, *Drunk Driving Cases: Prosecution and Defense*, Practicing Law Institute (1970). It is submitted that any correlation between the effect of alcohol on physical and perceptual skills and the effect on ability to make a voluntary (uncoerced) statement is minimal.

In *Townsend*, the defendant was administered phenobarbital and hyoscine, a drug which acts as a "truth serum." Clearly, the area affected by such a drug encompasses the very faculty involved in the exercise of free will. The drug acts to compel one to tell the truth and destroys the ability to refuse to tell the truth. As the court stated,

> "[i]t is difficult to imagine a situation in which a confession would be less the product of a free intellect, less voluntary, than when brought about by a drug having the effect of a 'truth serum.'" *Townsend* at 307-308.

No comparable substance was administered to the defendant in the instant case. Indeed, the defendant's condition was solely the result of his own actions.

The petitioner suggests that it is inconsistent to claim that the defendant was capable of understanding his rights and of exercising his right to remain silent and to have the assistance of counsel, and then to claim involuntariness and incapacity as to his statement. Moreover, such a claim ignores the findings of the trial court, which found only that the Commonwealth had failed to meet its "heavy burden" of demonstrating that the defendant had "knowingly and intelligently waived" his privilege against self-incrimination and right to counsel. *Findings and Rulings* (App. 63). While the courts of Massachusetts have indicated that special care must be taken to ensure that a defendant has not unknowingly waived his constitutional rights while under the influence of drugs or alcohol, the presence of such an influence does not automatically invalidate a waiver (*Commonwealth* v. *Hooks*, ____ Mass. ____, Mass. Adv. Sh. [1978] 1356, 1361, 376 N.E. 2d 857), let alone, the Commonwealth submits, automatically render a statement involuntary.

Respondent appears to ignore the distinction between waiver and the question whether a person has acted voluntarily. The distinction has been articulated by this Court, at least insofar as "trial rights" are concerned. See *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 238 n.25 (1973). See also *Brady* v. *United States*, 397 U.S. 742, 749 (1970); *McMann* v. *Richardson*, 397 U.S. 759, 766 (1970). Petitioner submits that the pretrial protections required by *Miranda* are similarly designed to protect the fairness of the trial itself and that the waiver and voluntariness distinction is equally applicable here.

"Waiver" has been described as "an intentional relinquishment or abandonment of a known right or privilege," *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938). Thus, lack of waiver may be found if the circumstances reveal that a defendant's actions were unintentional or that the defendant did not possess sufficient knowledge of his rights to make an intelligent decision. Neither finding leads necessarily to the conclusion that a defendant's "will was overborne," or that his statement was extracted by any sort of threat or violence, or direct or implied promises, or by exertion of improper influence. *Bram* v. *United States*, 168 U.S. 532, 542-543 (1897).

Petitioner submits that to jump from a finding that the Commonwealth has failed to demonstrate a knowing and intelligent waiver to the conclusion that a statement was involuntary in the Fifth Amendment sense is to stretch the concept of compulsion beyond all reasonable bounds.

IV. The "Fruit of the Poisonous Tree" Doctrine is Not Triggered Where the Initial Illegality does Not Violate a Constitutional Right.

The cases relied upon by respondent do not compel a finding that the "fruit of the poisonous tree" doctrine is applicable to

the instant case. In *People* v. *Robinson*, 48 Mich. App. 253, 210 N.W. 2d 372 (1973), the court applied the "fruit of the poisonous tree" doctrine to suppress evidence derived by police from a defendant's *involuntary* statement. Relying upon *Kastigar* v. *United States*, 406 U.S. 441 (1972), the court reached the conclusion that a Fifth Amendment branch of the poisonous tree doctrine had always been available "as an essential element of the Fifth Amendment guarantee." 210 N.W. 2d at 376.[3] This holding is not inconsistent with petitioner's assertion that the doctrine, if applicable at all, is only applicable where the initial statement is a product of compulsion or is otherwise involuntary.[4] See also *United States* v. *Harrison*, 265 F. Supp. 660 (S.D. N.Y. 1967); *United States* v. *Pellegrini*, 309 F. Supp. 250 (S.D. N.Y. 1970).

The automatic exclusion of real probative evidence based solely on the existence of a causal connection between that evidence and a statement taken in technical violation of

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[3] It should be noted that the court also relied upon *Tucker* v. *Johnson*, 352 F. Supp. 266 (E.D. Mich. 1972), subsequently reversed by this Court. *Michigan* v. *Tucker*, 417 U.S. 433 (1974).

[4] Such an approach approximates the proposal in A.L.I. *Model Code of Pre-Arraignment Procedure*, §§ 150.2-150.4, requiring that the violation be established as substantial before derivative conditions enumerated in § 150.3 of the Code, defining substantially, are present in the instant case.

> "a. The violation was gross, wilful and prejudicial to the accused. A violation shall be deemed wilful regardless of the good faith of the individual officer if it appears to be part of the practice of the law enforcement agency or was authorized by a high authority within it.
>
> "b. The violation was of a kind likely to lead accused persons to misunderstand their position or legal rights and to have influenced the accused's decision to make the statement.
>
> "c. The violation created a significant risk that an incriminating statement may have been untrue."

Pre-Arraignment Code, § 150.3.

Miranda v. *Arizona* is, the Commonwealth suggests, arbitrary and without justification. While application of the exclusionary rule may indeed deter future police misconduct, reasonable application of that rule should be premised only on a finding of wilful disregard of a specific constitutional right or an intentional practice. The deterrent effect on an unintentional impropriety, at most a mistake in judgment, is difficult to imagine.

Conclusion.

For the reasons stated in its brief and in this reply brief, the Commonwealth respectfully requests this Court to reverse the judgment of the court below.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1388

COMMONWEALTH OF MASSACHUSETTS,
Petitioner,

vs.

CHARLES F. WHITE,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS.

MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE IN SUPPORT OF THE PETITIONER, OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC.

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ON WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS.

MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE IN SUPPORT OF THE PETITIONER.

Americans for Effective Law Enforcement, Inc. respectfully moves this Court leave to file a brief, *amicus curiae,* in support of the petitioner in the instant case. This motion is made pursuant to Rule 42 of the Supreme Court Rules. The petitioner has consented to our filing; the respondent has not responded to our request for consent to file. Accordingly, we are moving the Court directly for leave to file. A letter from counsel for the petitioner has been filed with the Clerk of this Court. The interest of the *amicus curiae* and our reasons for desiring to file are set forth below.

INTEREST OF AMICUS CURIAE.

Americans for Effective Law Enforcement, Inc. (AELE) is a national not-for-profit citizens organization incorporated under the laws of the State of Illinois. As stated in its bylaws the purposes of AELE are:

1. To explore and consider the needs and requirements for the effective enforcement of criminal law.
2. To inform the public of these needs and requirements, to the end that the courts will administer justice based upon a due concern for the general welfare and security of law abiding citizens.
3. To assist the police, the prosecution, and the courts in promoting a more effective and fairer administration of the criminal law.

In the furtherance of these objectives, AELE seeks to represent in our courts, nationwide, the concern of the average citizen with the problems of crime and of police effectiveness to deal with crime.

This case, involving as it does both questions of search and seizure and the law of confessions and admissions, will have a major impact on police investigative techniques in the future. Additionally, this case presents a vehicle for this Court to consider the effect of the obvious good faith of the law enforcement officers involved in the case.

Accordingly, *amicus* respectfully moves this Court for leave to file our brief.

Respectfully submitted,

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BRIEF AMICUS CURIAE IN SUPPORT OF THE PETITIONER, OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC.

ARGUMENT.

I. Minor Judgmental Errors, Made by Police Officers Who Were Acting in Good Faith, Should Not Require Suppression of the Relevant and Probative Evidence of Guilt.

Amicus will not reiterate the legal arguments made by the Commonwealth of Massachusetts in the instant case, although we agree with them and wish to associate ourselves with them. We will confine our argument to the pragmatic issue of whether justice is served by suppressing relative and probative evidence of guilt when the law enforcement officers involved, acting in good faith, commit minor errors of judgment, particularly when

suppression would have little or no deterrent effect upon future police conduct.

The instant case is yet another in a line of cases in which this Court is called upon to review the constitutionality of police conduct which the lower courts have found to violate a given defendant's rights through rigid and inflexible application of the doctrines enunciated in *Mapp* v. *Ohio*, 367 U. S. 643 (1961) and *Miranda* v. *Arizona*, 384 U. S. 436 (1966).

This case differs from many others, however, in that *both* the exclusionary rule of search and seizure and the *Miranda* rule of suppression of confessions are involved, the one following from the other. If the defendant's statement to the state police trooper that there was marijuana in his car had not been barred because of the *Miranda* violation, then certainly the search warrant for the car which the trooper procured, based on those statements, would have been valid. Thus the lower court appended one suppression doctrine to another in order to reach its conclusion, and minor judgmental errors by police officers who were demonstrably acting in good faith became the basis for the suppression of probative and reliable evidence of guilt.

We believe that a sounder approach to such situations was enunciated by this Court in *Michigan* v. *Tucker*, 417 U. S. 433 (1974):

> Just as the law does not require that a defendant receive a perfect trial, only a fair one, it cannot realistically require that policemen investigating serious crimes make no errors whatsoever. The pressures of law enforcement and the vagaries of human nature would make such an expectation unrealistic. Before we penalize police error, therefore, we must consider whether the sanction serves a valid and useful purpose. At 446.

We submit that it is in the context of just such a realistic and balanced approach that the facts and circumstances of the instant case should be judged.

The record demonstrates that the law enforcement officers involved in this case were acting in good faith in their arrest and

handling of the defendant White. He was advised of his *Miranda* rights on three occasions: at the scene of his arrest for drunken driving, upon his arrival at the state police barracks, and at the time that the marijuana was discovered on his person. All of this indicates an effort by the police to comply with White's Fifth Amendment rights.

Likewise, the police were obviously not intent on violating White's Fourth Amendment rights. The State Trooper, after being told by White that there was marijuana in the car, ceased questioning him further and took the most prudent search and seizure course: he procured a search warrant for White's automobile.

Thus, it seems clear that rather than having any intention to *violate* the Fourth and Fifth Amendment rights of Respondent White, the law enforcement officers were observing these rights as scrupulously as they knew how.

In the language from *Michigan* v. *Tucker* cited above at 446, it is stated that it would be unrealistic to require that the police make no errors whatsoever. Yet, the lower court ordered the suppression of the marijuana seized from the car based on two "errors" which it had found the police had made.

First, the officers involved were not able to predict that the trial court would "second guess" them as to the defendant's condition of intoxication; nor that the Supreme Judicial Court of Massachusetts would uphold the trial court by ruling that White was in too drunken a condition to make a knowing waiver of his *Miranda* rights. This fact is underscored by the fact that the state Supreme Court found the facts in the instant case to be "not so compelling" as in an earlier case in which that court had held invalid a purported waiver by a drunken, highly agitated rape suspect.[1] In other words, the condition of intoxication of defendant White was below the threshold previously set by the Supreme Judicial Court of Massachusetts for determining whether a waiver was valid or invalid depending upon a given suspect's degree of intoxication.

1. *Commonwealth* v. *Hosey*, 334 N. E. 2d 44 (Mass. 1975).

The second "error" occurred when the state trooper, who was searching White prior to putting him in the lock-up, found a marijuana cigarette in his shirt pocket, readvised him of his *Miranda* rights and then asked him if he had more marijuana on his person or in his car. White replied that he did have some marijuana in his car and that he could name them some "biggies."[2]

This, the lower court held, violated the defendant's rights because he had unsuccessfully attempted to call an attorney and had done nothing to indicate that he had changed his mind about wanting a lawyer.

There is nothing in this transaction to indicate that the trooper acted in an oppressive manner. In fact, the third *Miranda* warning, after the finding of the cigarette, the trooper's desire not to discuss the matter further with White, and the fact that the trooper procured a search warrant, indicate that he was still being observant of the defendant's rights. At worst, the single question asked by the trooper was a judgmental error.

When the circumstances in this case are viewed in their entirety, we submit that the "errors" of the policemen, in the context of their otherwise scrupulous observation of the defendant's rights, should not require the suppression of the evidence either on Fourth *or* Fifth Amendment bases.

The lower court applied a rigid and technical interpretation to the questions involved, holding the *Miranda* requirements and the resulting "fruit of the poisonous tree" doctrine to be absolute. This Court, on the other hand, has, in recent years, taught that there must be some flexibility in the balance between the rights of the accused and the needs of law enforcement. This balancing test has been applied in Fifth Amendment cases in which this Court has weighed the requirements of the *Miranda* decision against the realities of the criminal law enforcement process.

2. This statement about "biggies" casts doubt on the lower court's holding that White was too drunk to waive his rights. At least he was lucid enough to realize that he was in trouble and that he might be able to "buy his way out" by turning informant.

For example, statements taken in violation of *Miranda* may nevertheless be used by the prosecution to impeach the testimony of a criminal defendant who takes the witness stand at trial, *Harris* v. *New York*, 401 U. S. 222 (1971); an adverse witness could testify against the defendant even though his existence had been discovered through statements taken from a defendant who had not been advised of his *Miranda* rights, *Michigan* v. *Tucker*, *supra;* or, renewed questioning of a suspect, who had invoked his privilege not to answer questions, at a later time and about a different crime, did not violate *Miranda*, *Michigan* v. *Mosley*, 423 U. S. 96 (1975).

Likewise, this Court has, in recent years, demonstrated a flexible approach to the application of the exclusionary rule. For example, illegally seized evidence may be used in grand jury proceedings, *U. S.* v. *Calandra*, 414 U. S. 338 (1974); illegally seized evidence may be used in civil proceedings, *U. S.* v. *Janis*, 428 U. S. 433 (1976); living witness testimony which was a fruit of an illegal search may be used to obtain a perjury conviction, *U. S.* v. *Ceccolini*, ____ U. S. ____, 22 Cr. L. 3510 (1978).

There is, then, according to the teachings of this Court, a flexibility in the law of criminal procedure based upon the need for a balance between the rights of society and the rights of the accused. In cases such as this one, in which the good faith of the police can be demonstrated and in which such errors as they might have made are minor, we submit that the balancing test should be resolved in favor of the needs of effective law enforcement and against the suppression of the truth.

This Court in *Michigan* v. *Tucker*, *supra*, not only dealt with the fact that policemen will of necessity make errors, but further concluded that:

> Before we penalize police error, therefore, *we must consider whether the sanction serves a valid and useful purpose. Supra*, at 446. (Emphasis supplied.)

In the facts and circumstances of the instant case, because the law enforcement officers were acting in good faith, the "sanction" (*i.e.*, suppression) will serve no "useful and valid purpose" (*i.e.*, deterrence of future police misconduct). An officer who acts in good faith because he believes that his actions are reasonable will not be deterred in future cases because that is how a reasonable man would have acted.

Mr. Justice White, dissenting in *Stone* v. *Powell*, 428 U. S. 465 (1976), underscored this point:

> When law enforcement personnel have acted mistakenly, but in good faith and on reasonable grounds, and yet the evidence they have seized is later excluded, the exclusion can have no deterrent effect. The officers, if they do their duty, will act in similar fashion in similar circumstances in the future; and the only consequence of the rule as presently administered is that unimpeachable and probative evidence is kept from the trier of fact and the truth-finding function of proceedings is substantially impaired or a trial totally aborted. At 541.

The instant case, then, contains three crucial elements: (1) good faith activity on the part of the police; (2) minor judgmental errors which were "second guessed" by the lower courts; and (3) little likelihood of future deterrence. This is, as we have noted, precisely the kind of case in which the balance between the conflicting interests should be resolved in favor of the needs of law enforcement.

CONCLUSION.

The suppression of the evidence in this case came as a result of minor errors in judgment made by police officers who were acting in good faith. The facts of the case make it apparent that little as a deterrent to future police "misconduct" would result if this Court upholds the suppression of evidence. For these reasons, we respectfully urge this Court to reverse the judgment of the Supreme Judicial Court of Massachusetts.

Respectfully submitted,

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